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# EXPANDING STATE JURISDICTION TO REGULATE OUT-OF-STATE LAWYERS

*Charles W. Wolfram\**

## I. INTRODUCTION

Lawyers, like other members of the human species, are creatures of habit. When thinking about which lawyers are subject to professional discipline, lawyers have long been habituated to think of two sets of practitioners. That orthodox view is that the first set consists of those lawyers subject to regulation, and it includes all lawyers admitted to practice in a particular jurisdiction. Those lawyers are subject to professional discipline in their state (or states) of admission, but nowhere else.<sup>1</sup> For example, in Wisconsin, bar disciplinary officials regulate only those lawyers, of all the lawyers in the United States, who have been admitted to practice in Wisconsin.<sup>2</sup> Through that “hook” of local admission leading to plenary disciplinary power, the bar can threaten the professional status of all locally-admitted practitioners as “members of the [local] bar” through some greater (disbarment) or lesser (suspension, reprimand, etc.) professional discipline. The second set—those lawyers *not* subject to discipline, according to orthodoxy—consists of all lawyers *not* admitted locally. Thus, in Wisconsin and most other states,<sup>3</sup> the bar disciplinary system is thought not to have any power to regulate lawyers not admitted there.

Through a kind of wooden path dependency, that tradition of rigid separation between admitted and nonadmitted lawyers obtains in most states no matter how offensive the activities of nonadmitted lawyers might have been, or in what other respects interests of the nonadmitting

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1. *See, e.g.*, *Attorney Grievance Comm’n v. Hyatt*, 490 A.2d 1224, 1227 (Md. 1985).

2. *See infra* notes 19-20 and accompanying text.

3. For the small minority of jurisdictions in which, to date, a more extensive jurisdiction is asserted, *see infra* notes 160-61 and accompanying text.

state might be strongly implicated. If, for example, a nonadmitted lawyer's activities in the state caused injury to in-state clients, there is nothing by way of discipline that bar disciplinary authorities in the state can or will do. That result also obtains no matter that the activity occurred entirely, or in some significant part, within the nonadmitting state or for some other reason would be of great local interest if the same injury had been caused by a locally admitted lawyer. That state of affairs has been the more or less unquestioned arrangement since lawyer regulation became a serious matter in the lives of lawyers earlier in the last century.

The concept that a jurisdiction may affect the professional status of any lawyer admitted there has proved to be largely unexceptionable. But its negative flipside—holding that nonadmitted lawyers are entirely beyond local disciplinary authority—is another matter. That part of the traditional arrangement makes little sense and entails self-inflicted limitations that threaten seriously to undermine an important—and localizable—objective of lawyer regulation. It also creates significant disparities in the reach of local regulation over admitted and nonadmitted lawyers, and is unnecessary under either the Federal Constitution or any generally applicable notion of state law. I argue here that the basis for lawyer regulation should shift from the negatively-limited “hook” of local admission to a more soundly-reasoned and realistically-based theory of expanded, but nonetheless still limited, disciplinary power. The constitutional power of a state to regulate commercial and professional activities more broadly—quite beyond what the local admission basis allows—is so well supportable as to be beyond serious challenge.<sup>4</sup> Indeed, the defects in the local admission rule have now become sufficiently clear that important groups in the American Bar Association (“ABA”) have called for its replacement with a more soundly-grounded approach.<sup>5</sup> This Article supports those efforts, with some tweaking. Those groups include the so-called ABA Ethics 2000 Commission, which is currently engaged in substantially reworking the ABA *Model Rules of Professional Conduct*,<sup>6</sup> the drafters

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4. See *infra* note 203 and accompanying text.

5. See *infra* note 164 and accompanying text.

6. See generally COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, ABA, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES (2001) [hereinafter REPORT WITH RECOMMENDATION], available at [http://www.abanet.org/cpr/e2k-whole\\_rpt.doc](http://www.abanet.org/cpr/e2k-whole_rpt.doc) (last visited Mar. 22, 2002). At the August 2001 meeting of the ABA House of Delegates, action was taken on the Commission's proposed amendments to the rules through Rule 1.10. The remaining amendments, except for those to Rules 5.5 and 8.5, were considered at the early-February 2002 mid-year meeting. See *Ethics 2000—February 2002 Report*, at [http://www.abanet.org/cpre/e2k-202report\\_summ.html](http://www.abanet.org/cpre/e2k-202report_summ.html)

of the ABA *Model Rules for Lawyer Disciplinary Enforcement*,<sup>7</sup> and several state supreme courts.<sup>8</sup>

Rejection of the traditional limitation of the local admission rule over nonadmitted lawyers does not, however, mean that a state's power to regulate lawyers should be embraced in disregard of state lines and consequent limits on state power under the federal and state constitutions. Obviously, real limits exist under the Federal Constitution, constraining the extent to which a state may regulate extraterritorially (but hardly forbidding all such regulation).<sup>9</sup> Moreover, and regardless of (but certainly contemplating) constitutional limits, there are sound reasons of local and interstate policy why a state should forebear from attempting to exercise all possible constitutional power to regulate out-of-state lawyers. An extravagant reach of such power would both impose unwanted and unnecessary costs on the local regulatory apparatus and could seriously impair legitimate and important interstate lawyering activities of out-of-state lawyers.

In the discussion that follows, I first review the traditional local admission basis for lawyer regulation, noting other remedies available in the local state that might be thought to be suitable alternatives to discipline, the anomalies that application of the local admission rule has produced, and the largely historical accidents that first produced the local admission rule but which are now irrelevant.<sup>10</sup> I then assess how the local admission basis for discipline has led to unfortunate consequences.<sup>11</sup> Third, and finally, I suggest a framework within which a properly modulated system of state regulation of nonadmitted lawyers might operate.<sup>12</sup> To a large extent, this is congruent with existing proposals for alternative approaches, but with possible differences in two directions. First, I support language making it clear that all lawyering activities (of a described kind) are covered, and second, I propose to limit explicitly what might otherwise become occasional abuses of such jurisdiction. What is needed is a practical and restrained notion under

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(last visited Mar. 20, 2002). For consideration of the pertinent Ethics 2000 Commission recommendations, see *infra* notes 163-64 and accompanying text.

7. See, e.g., MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 6 (2001) [hereinafter MODEL DISCIPLINARY RULES].

8. See *infra* notes 151-62 and accompanying text.

9. See, e.g., Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 487-519 (1992).

10. See *infra* notes 34-61, 106-69 and accompanying text.

11. See *infra* notes 170-97 and accompanying text.

12. See *infra* notes 198-210 and accompanying text.

which some, but not all, activities of out-of-state lawyers with in-state impacts are locally regulated. A concluding part of this Article offers such a defining concept of "significant in-state activity" by lawyers who are not locally admitted to practice.<sup>13</sup> Such an exercise of power would be within applicable constitutional limitations, would extend regulatory jurisdiction only to the extent appropriate to vindicate strong and legitimate state interests while avoiding interfering with legitimate interstate law practice, and would provide a practical tool by which in-state lawyer regulators could better police the profession.

## II. THE CENTERING OF LAWYER DISCIPLINE ON LOCAL ADMISSION

At the outset, it would be well to illustrate further how the traditional regulatory touchstone of in-state admission has worked in practice. The operation of the rule is both simple and long-established. Take as an example of this rule a recent West Virginia case, which also provides an interesting glimpse at the earlier career of a lawyer who has since gone on to fame as a national television figure. As will be seen, while the facts are illustrative of the traditional approach, the court took an uncompromisingly modern approach to the question of its jurisdiction to discipline. According to the state supreme court's findings in *Lawyer Disciplinary Board v. Allen*,<sup>14</sup> out-of-state lawyers from the District of Columbia<sup>15</sup> law firm of Allen, Coale & Van Susteren had engaged in blatant in-state, in-person solicitation of clients over a period of three years in violation of West Virginia laws prohibiting such activities.<sup>16</sup> The D.C. lawyers, perhaps emboldened by the fact that their "home" jurisdiction (among only a small handful of jurisdictions in the nation) allows truthful and noncoercive in-person solicitation everywhere except on the local courthouse steps and sidewalks,<sup>17</sup> had, according to the West Virginia court, made direct telephone contact (either personally or

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13. See *infra* notes 206-10 and accompanying text.

14. 479 S.E.2d 317 (W. Va. 1996).

15. On the irony involved in the lawyers' state of local admission, see *infra* note 26 and accompanying text.

16. See *Allen*, 479 S.E.2d at 323. Some of the solicitations were through agents sent personally into the state, while other instances consisted of phone calls from outside West Virginia to prospective clients in the state. See *id.* at 324.

17. See D.C. RULES OF PROF'L CONDUCT R. 7.1(d) (2000) (stating prohibition against courthouse-steps solicitation); see also *id.* R. 7.1(b)(1)-(5) (limiting in-person solicitation to statements that are not false or misleading, that do not involve the use of undue influence, that do not involve a person in a physical or mental condition such that they cannot exercise considered judgment about selecting a lawyer, and, if it involves an intermediary, complies with other detailed requirements).

through nonlawyer intermediaries) with potential clients in West Virginia, seeking to sign them up as clients—perhaps with the idea of filing suits in the District of Columbia or elsewhere outside of the state.<sup>18</sup> Because the soliciting lawyers were not admitted to practice in West Virginia, the traditional approach, which this Article criticizes, would have forced the court to conclude that it had no regulatory power over them.<sup>19</sup> It is of interest that the court's concept of jurisdictional power apparently was limited to the power to discipline (as distinguished from the power to adjudicate), as the court went to some length to establish that the facts supported a finding of several disciplinary violations.<sup>20</sup> Nonetheless, the West Virginia court in *Allen* announced prospectively that in the future its bar disciplinary agency would exercise sanctioning jurisdiction over any and all out-of-state lawyers who might “engage in the practice of law” in the state—with no limitation to practicing

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18. See *Allen*, 479 S.E.2d at 329. The safest disciplinary course for the soliciting lawyers would have been to file suit on behalf of their clients outside West Virginia. Filing suit in a court in West Virginia would have required that the D.C. lawyers enter their appearance there which, in turn, would require that they either show that they were locally admitted for all purposes or move to be admitted *pro hac vice*. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3(2) & cmt. g (2000) [hereinafter RESTATEMENT, LAWYERS] (noting both general-admission and special-admission bases for appearance of lawyer in litigation); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.4.3 (1986) [hereinafter WOLFRAM, MODERN LEGAL ETHICS] (discussing admission *pro hac vice*). The former course (obtaining local admission as a fully-credentialed lawyer for all purposes) would, of course, subject the lawyers to West Virginia regulation under the local-admission rule for all purposes. The latter course (obtaining only *pro hac vice* admission) would subject them to regulation to the much more limited extent of threatening their ability to proceed in that particular case if complaints were made that they had violated a local antisolicitation rule. On the typically limited disciplinary power of a court over a lawyer admitted to practice *pro hac vice*, see *infra* notes 45-61 and accompanying text.

19. In fact, the West Virginia court had already moved partly in the direction this Article will urge. Its standards as promulgated at the time of the lawyers' alleged solicitation covered both lawyers locally admitted as well as lawyers who, although admitted elsewhere, “regularly engaged in the practice of law” in West Virginia. *Allen*, 479 S.E.2d at 335 (quoting Article VI, § 4 of the West Virginia State Bar By-Laws). A key issue for the court was whether the lawyer's cumulative activities constituted such “regular” practice. Although finding it a close question, the court concluded that the lawyers' activities did not rise to that level. See *id.* at 336. Thus, the court's implicit holding is that the bar lacked jurisdiction to sanction, although it did have jurisdiction to conduct a hearing and announce a declaratory decision on the questioned conduct. See *id.* at 332, 336 (accepting lawyers' characterization of issue as limited to whether lawyer disciplinary board had “jurisdiction to impose disciplinary sanctions”). Elsewhere, however, the court refers to whether “the conduct in which respondents engaged is . . . subject to our disciplinary procedures.” *Id.* at 336. But see *Attorney Grievance Comm'n v. Hyatt*, 490 A.2d 1224, 1227 (Md. 1985) (indicating that because a lawyer was not locally admitted or otherwise subject to discipline in-state, the court could not pass on merits of disciplinary charges, even at the urging of the lawyer respondent, which was rejected by the court, and the court stated that “subject matter jurisdiction cannot be conferred by consent of the parties”).

20. See *Allen*, 479 S.E.2d at 336, 339.

regularly or to any other extent.<sup>21</sup> That future approach would be quite dramatically at odds with traditional doctrine. Although I applaud the court's creativity and its rejection of the wooden rule of local admission, the court seems to indicate only a vaguely intuited set of limitations on its notion of extraterritorial power to discipline. On further reflection, one would hope that if I read the West Virginia court's intimations correctly—it and all states would adopt a somewhat more limited approach.<sup>22</sup>

Because it will be deployed as an illustrative disciplinary offense below,<sup>23</sup> it would be well to pause over the particular offense charged in *Allen*, in-person<sup>24</sup> solicitation for pecuniary gain (fees). Such activities are prohibited throughout the United States,<sup>25</sup> with the sole exception of the District of Columbia,<sup>26</sup> and, to a less-open extent, two or three other states.<sup>27</sup> A few scholars have criticized the prohibition,<sup>28</sup> as has the

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21. *Id.* at 336 & n.29 (broadly stating that “a lawyer is subject to discipline in this State . . . whether or not he or she is formally admitted to practice by this Court” and citing W. VA. R. LAWYER DISCIPLINARY P. R. 1 (Michie 1994) (requiring only that a lawyer “engage[] in the practice of law in West Virginia” to be subject to discipline)).

22. *See infra* notes 198-210 and accompanying text.

23. *See infra* notes 24-41 and accompanying text.

24. After *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), it is now conventional to distinguish face-to-face (face-to-face, telephonic, or similar instant-response) communication from indirect (if nonetheless targeted) communication, as through the mail or through a non-chat room e-mail connection. Direct mail is considered entitled to commercial speech constitutional protection under *In re R.M.J.*, 455 U.S. 191 (1982), which held that commercial speech protection applies to a lawyer's mailing of professional cards to prospective clients, *see id.* at 206-07, and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which held that the mailing of a letter suggesting legal services to persons known to be in need of such services was constitutionally protected, *see id.* at 637. Allowing direct mail advertising is consistent with the prohibition against in-person solicitation both because it is markedly less intrusive or subject to overbearing practices and because it provides inherent proof of its content. *See Allen*, 479 S.E.2d at 326; *see also* *Texans Against Censorship, Inc. v. State Bar*, 888 F. Supp. 1328, 1354 (E.D. Tex. 1995) (indicating that it is permissible to regulate telephone solicitation because medium involves the same risks as in-person solicitation, with additional difficulty that recipient might not be able to identify caller), *aff'd mem.*, 100 F.3d 953 (5th Cir. 1996).

25. *See generally* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 57.3 (3d ed. 2001) (stating that modern lawyer codes “strictly proscribe” in-person solicitation for pecuniary gain); WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 14.2.5, at 785-87 (generally describing scope of antisolicitation position of lawyer codes). For exceptions, *see infra* notes 26-27 and accompanying text.

26. *See* WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 14.2.5, at 786.

27. *See generally Solicitation—General*, *Laws. Man. on Prof. Conduct* (ABA/BNA), at 81:2001-05 (Apr. 22, 1992) (describing the near-universal acceptance of prohibition against in-person solicitation for pecuniary gain, but also showing slight deviations from that general proposition).

28. *See, e.g.*, MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 250-65 (1990) (arguing for broad acceptance of solicitation in interests of free expression and as method of informing wronged persons of their legal rights, although noting near-universal rejection of such

national organization of claimants' counsel,<sup>29</sup> but it has been upheld as constitutional by a unanimous United States Supreme Court.<sup>30</sup> It seems highly unlikely that other states will be tempted to lessen the typical view with which solicitation is prosecuted almost everywhere when proof of the offense is available. As will be seen, given the strong policy grounds for prohibiting lawyers from in-person solicitation for pecuniary gain, presumably bar authorities in the great majority of states that prohibit it would be highly motivated to consider favorably an approach to disciplinary jurisdiction that would cover instances of in-state solicitation by nonadmitted lawyers or their agents.<sup>31</sup>

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arguments); Drake D. Hill, *Deconstructing the Prophylactic Ban on Lawyer Solicitation*, 62 TEMP. L. REV. 875, 896, 899-900 (1989) (arguing for truth-in-soliciting rule instead of outright ban); Kristina N. Bailey, Note, "Rainmaking" and D.C. Rule of Professional Conduct 7.1: The In-Person Solicitation of Clients, 9 GEO. J. LEGAL ETHICS 1335, 1351-54 (1996) (providing a similar argument).

29. See THE ROSCOE POUND-AM. TRIAL LAWYERS FOUND., THE AMERICAN LAWYER'S CODE OF CONDUCT 701-704 (Public Discussion Draft 1980) [hereinafter ATLA CODE]. Among other startling propositions, the ATLA Code would have permitted solicitation of a fifteen-year old female accident victim in a hospital room, so long as the hospital had not adopted an explicit regulation prohibiting the activity. See *id.* at 703 (illustrative case 7(d)). While styled a "public discussion draft," the ATLA draft was never officially adopted by that organization. It seems to have served only as a possible challenge to the ABA's own *Model Rules of Professional Conduct* that were then being circulated for comment. See generally WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 2.6, at 62 (stating ATLA's self-described efforts for its draft to serve as counterproposal to the ABA's Model Rules). The ATLA document was drafted by Professor Monroe Freedman. See ATLA CODE, *supra*, at ii.

Not all groups of claimants' counsel agree with Professor Freedman. In 1993-94, the Texas Trial Lawyers Association successfully lobbied the state legislature to increase the criminal penalty for in-person or telephone solicitation to a felony in order to encourage more vigorous prosecution. See, e.g., Milo Geyelin, *Texas Lawyers Seek Bill to Curb Their Soliciting*, WALL ST. J., May 25, 1993, at B1 (providing a news account of lobbying effort of Texas Trial Lawyers Association). The lobbying succeeded. See TEX. PENAL CODE ANN. § 38.12(a), (b), (f) (Vernon Supp. 2002) (making such solicitation a felony).

30. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (holding that states could, consistent with lawyers' limited constitutional right to free expression, prohibit solicitation of clients for pecuniary gain). A general exception exists for "non-pecuniary" solicitation, as when a lawyer for an advocacy organization seeks a client willing to serve as the named party in test litigation or the like. See *In re Primus*, 436 U.S. 412, 422, 439 (1978) (holding that commercial speech doctrine of First Amendment, limiting what would otherwise be constitutional free expression protection, is inapplicable to such solicitation). Another limited exception is for in-person solicitation, even if for pecuniary gain (fees), when carried out in connection with recruiting claimants for a federal court class action. See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-03 (1981) (stating that the trial court injunction against contact with potential class members was an abuse of discretion as inconsistent with class action rules of federal procedure, unless a court makes a substantial evidence-based determination of particular need).

31. See *infra* text accompanying notes 191-97.



### III. LOCAL REMEDIES OTHER THAN PROFESSIONAL DISCIPLINE

Other remedies than that of professional discipline are theoretically available against an out-of-state lawyer who commits a disciplinary offense in the local state, but each has serious limitations. On the facts alleged<sup>32</sup> in the *Allen* opinion, West Virginia's bar regulators might have held out the hope for admission-state discipline—here, the hope that the District of Columbia bar-regulatory body would prosecute its “own,” thus vindicating West Virginia's antisolicitation policy. But, as will be discussed, that is typically (and here) an unlikely, although possible, eventuality.<sup>33</sup>

A possible alternative approach would be for West Virginia bar disciplinary officials to resort to local tribunals seeking nondisciplinary remedies. The most likely such approach is a local suit for *injunctive relief* against the offending out-of-state lawyers, seeking to enjoin repetition of such impermissible in-state activities. Such lawsuits are not unknown,<sup>34</sup> and their possible implications are serious for the offending lawyer.<sup>35</sup> Personal jurisdiction over an out-of-state lawyer would be

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32. On other facts, of course, additional remedies would be available. Of great importance, most states take the position that the remedy of fee forfeiture (including the denial of fees not yet paid) is available, for example with respect to a lawyer admitted in another state who commits unauthorized practice within the state. *See, e.g.,* *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 13 (Cal. 1998) (holding that a New York lawyer who performed legal services in California at the request of clients who controlled a California corporation engaged in unauthorized practice and could not recover fees for work there); *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 181 (Fla. 1995) (holding that Massachusetts lawyer who resided but was not admitted in Florida committed unauthorized practice by entering into contingent fee contract with Florida client, making contract void). The nonadmitted lawyer is also subject to suit in the state through exercise of the state's long-arm jurisdiction. *See infra* notes 36, 169 and accompanying text. Thus, the usual panoply of remedies available to a client against a lawyer are available, and probably at a forum convenient for the client, against the out-of-state lawyer.

33. *See infra* notes 62-103 and accompanying text.

34. *See, e.g.,* *Unauthorized Practice of Law Comm. v. Bodhaine*, 738 P.2d 376, 377 (Colo. 1987) (en banc) (granting a prohibitory injunction against lawyer admitted in California from in-state (Colorado) unauthorized practice of law); *Fla. Bar v. Lister*, 662 So. 2d 1241, 1242 (Fla. 1995) (per curiam) (enjoining Wisconsin lawyer living in Florida from providing legal services and holding self out to practice law in Florida); *Kennedy v. Bar Ass'n*, 561 A.2d 200, 202, 211-23 (Md. 1989) (affirming, but modifying injunction against D.C.-admitted lawyer (not admitted in Maryland) who publicly held himself out as lawyer engaged in general practice of law in Maryland from principal office there); *Cleveland Bar Ass'n v. Moore*, 722 N.E.2d 514, 514, 515 (Ohio 2000) (per curiam) (enjoining Pennsylvania-admitted lawyer conducting personal injury practice from further practice in his office in Ohio); *Cleveland Bar Ass'n v. Misch*, 695 N.E.2d 244, 245, 248 (Ohio 1998) (per curiam) (enjoining Illinois lawyer from functioning as “independent contractor” of Ohio law firm). Lawyer Kennedy, disciplined in Maryland, *see Kennedy*, 561 A.2d at 213, was subsequently disciplined as well in the District of Columbia, *see infra* note 116.

35. On the possible collateral consequences of local bar discipline, *see infra* Part IV.A. Similarly, injunctive relief may possibly provide a basis for discipline in the lawyer's home state.

obtainable through resort to West Virginia's "long-arm" statute,<sup>36</sup> which subjects to in-state lawsuits any person who causes certain in-state effects, even if from a place outside the state. But such lawsuits are relatively more expensive and cumbersome, as compared to lawyer discipline. Moreover, the contempt remedy is generally of no value to remedy wrongs already committed, and indeed it might not be available under the doctrine limiting the remedy to ongoing conduct or at least to past conduct when there is shown to be a substantial threat of its repetition.<sup>37</sup> Moreover, while the trial judge would presumably be somewhat familiar with West Virginia's lawyer code and its requirements (for example, through presiding in litigated cases involving legal malpractice or lawyer disqualification), her familiarity would pale beside that of the bar disciplinary tribunals that adjudicate complaints brought within the system of professional discipline.

Another possibility would have been *criminal prosecution* in a West Virginia court, if the jurisdiction's criminal statutes contained an appropriately worded antisolicitation law.<sup>38</sup> But, even if such a statute

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However, the burden necessary to obtain injunctive relief in common use among the states is the preponderance standard, while bar discipline typically requires a more exacting standard of proof, such as the commonly employed "clear and convincing" standard. *See generally* RESTATEMENT, LAWYERS, *supra* note 18, § 5 (stating that standard of proof in lawyer disciplinary proceedings "in most jurisdictions is clear and convincing evidence, that is, evidence establishing the truth of the charged offense beyond a mere preponderance of the evidence but not necessarily beyond a reasonable doubt").

36. *See, e.g.,* Clark v. Milam, 847 F. Supp. 409, 414 (S.D. W. Va. 1994) (applying West Virginia's interpretation of state's long-arm statute, suggesting that lawyer who transacts any business in state is subject to substituted service on claim based on such contact). *See generally* KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 69-72 (1999). West Virginia, along with all other states, has a long-arm statute. *See* W. VA. CODE ANN. § 56-3-33 (Michie Supp. 2001). As is typical, its courts interpret the statute to apply to all instances in which it would not offend due process to do so. *See, e.g.,* Lozinski v. Lozinski, 408 S.E.2d 310, 311, 313 (W. Va. 1991) (holding that West Virginia could exercise personal jurisdiction under its long-arm statute over person who committed a tort by failing to support his children in the state). Long-arm statutes are chiefly useful to obtain specific jurisdiction, that is power over an out-of-state individual for litigation directly relating to his or her in-state activities. *See, e.g.,* Parsons v. Mains, 580 A.2d 1329, 1329, 1330 (D.C. 1990) (per curiam) (holding that Virginia lawyer who was counsel of record in two or three actions in D.C. over a ten-year period was not subject to jurisdiction in D.C. for alleged breach of contract and conversion not related to local activities).

37. *See, e.g.,* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 2.9, at 225 (2d ed. 1993) (discussing need to show threat of repetition for preventive injunction).

38. *See, e.g.,* CAL. BUS. & PROF. CODE § 6126(a) (West 1990) ("Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor."); N.Y. EDUC. LAW § 6512 (McKinney 2001) (stating a similar provision, but making the offense a "class E felony"); S.C. CODE ANN. § 40-5-310 (Law. Co-op. 2001) (stating that violation of a statute providing that "[n]o person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney" is a felony); WASH. REV. CODE ANN. § 2.48.180 (West

were on the books, for West Virginia to prosecute District of Columbia lawyers would require obtaining a local indictment or information, successfully completing an extradition proceeding in the District, and complying with the panoply of criminal-procedural rules applicable to criminal suspects on the lam.<sup>39</sup> Not surprisingly, recorded instances of such criminal prosecutions against out-of-state lawyers are rare, although not unknown.<sup>40</sup> Although there is no constitutional requirement that an extradition request charge a felony,<sup>41</sup> that is the usual, although not invariable, practice.<sup>42</sup> Criminal prosecution of a lawyer could be an expensive, time-consuming process for a prosecutor. If the only available sanctions are those made available for a misdemeanor offense, prosecution is simply unlikely.<sup>43</sup>

Yet another theoretical possibility exists: discipline based on a nonlocal lawyer's *pro hac vice* admission. The possibility is of note because the *Allen* decision indicates that the lawyers in question had on

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Supp. 2002) (providing that a single offense is misdemeanor; multiple or subsequent offenses can be prosecuted as felony).

39. See D.C. CODE ANN. § 23-704 (2001).

40. See Michael Higgins, *Tempting Targets: Mass-Tort Lawyer Among Those Facing Criminal Charges*, A.B.A. J., July 1997, at 26, 26-27 (describing criminal prosecutions in South Carolina against several prominent Texas personal injury lawyers for local solicitation of possible victims of air crash); Juliet Eilperin, *Crash Solicitation Fallout: Musslewhite Son Cooperates, Father Defends*, NAT'L L.J., May 5, 1997, at A4 (providing news account of South Carolina criminal prosecution, indicating charged offense was felony of conspiracy to solicit); *O'Quinn Pleads Guilty to Practicing Law Without a License*, WALL ST. J., Dec. 18, 1997, at B12 (providing a news account of guilty plea of one of two Texas lawyers charged in South Carolina, who pleaded guilty to the lesser-included-offense of unauthorized practice, with fines and compulsory contribution of \$250,000 to fund ethics seminars and special prosecutor's unit to investigate ambulance-chasing); Bob Van Voris, *Problems at Home: O'Quinn Fights Off Disbarment Effort*, NAT'L L.J., Jan. 19, 1998, at A5 (providing news account of the filing of disciplinary petition against the same Texas lawyers involved in South Carolina solicitation charges).

41. See *Ex parte Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 99-100 (1861), *overruled on other grounds by* *Puerto Rico v. Branstad*, 483 U.S. 219 (1987). *Dennison* involved a most unappealing attempt by Kentucky to compel the Governor of Ohio to extradite Dennison for attempting to assist a Kentucky slave to flee slavery. See *id.* at 67. The opinion of the Supreme Court, upholding Kentucky's effort, was written by Chief Justice Taney. See *id.* at 95. Despite its tarnished pedigree, *Dennison* remains the law on the availability of interstate extradition for misdemeanor offenses. See, e.g., *Starks v. Turner*, 365 P.2d 564, 565-66 (Okla. Crim. App. 1961) (holding that references to "crime" in the Extradition Clause of Federal Constitution (U.S. CONST. art. 4, § 2) was authoritatively established by *Dennison* to include the misdemeanor offense of, here, writing bad check).

42. See Leslie W. Abramson, *Extradition in America: Of Uniform Acts and Governmental Discretion*, 33 BAYLOR L. REV. 793, 839 (1981).

43. For similar reasons, state criminal statutes against solicitation are rarely enforced by prosecutors. See Geyelin, *supra* note 29 (providing news report of effort by Texas Trial Lawyers Association to boost penalty for solicitation to felony (from misdemeanor), among other reasons, to provide incentive to prosecutors to enforce statute).

occasion appeared in (apparently unrelated) West Virginia litigation, presumably based on such admissions.<sup>44</sup> Appearances *pro hac vice* are a method of permitting nonlocal lawyers to appear and represent a client in one matter but not to practice law generally in the state.<sup>45</sup> By tradition, the procedure is limited to representations involving already-filed litigation.<sup>46</sup> It appears to have arisen out of the procedural mechanics of entering and recognizing appearances in litigation, rather than out of a general rulemaking exercise in which the courts of a state (or its legislature) considered broadly the situations in which it would be sensible to permit nonadmitted lawyers to practice within the state. As a result, that sort of admission is broadly available for litigation practice but is not available for a transactional lawyer who might wish to provide in-state legal services in nonlitigation settings.<sup>47</sup> Indeed, it is not

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44. See Lawyer Disciplinary Bd. v. Allen, 479 S.E.2d 317, 335-36 (W. Va. 1996).

45. See generally *Pro Hac Vice Admission*, Laws. Man. on Prof. Conduct (ABA/BNA), at 21:2006-13 (Nov. 22, 2000) [hereinafter *Pro Hac Vice Admission*] (canvassing law on *pro hac vice* admission in several states). *Pro hac vice* admission, which is very widely available in general, often comes with attached restrictions—in some jurisdictions being quite onerous. See *id.* at 21:2006-07. A restriction found in several states limits the number of such representations per year. See *id.* at 21:2009. Most states, of course, will refuse to allow such admissions to become a device for a resident lawyer to practice locally through such admissions seriatim and without being otherwise admitted. See, e.g., *Brookens v. Comm. on Unauthorized Practice of Law*, 538 A.2d 1120, 1124, 1127 (D.C. 1988) (affirming finding of contempt against District resident, admitted only in Wisconsin and Pennsylvania, who maintained local office for almost a decade and regularly practiced law there through *pro hac vice* admissions); *S.C. Med. Malpractice Joint Underwriting Ass'n v. Froelich*, 377 S.E.2d 306, 308 (S.C. 1989) (per curiam) (refusing to admit and stating that *pro hac vice* admission was not device whereby South Carolina resident lawyer, admitted only in Illinois, could carry on South Carolina litigation practice). More problematic are restrictions that appear mainly or entirely anticompetitive and protective only of local practitioners. See, e.g., *United States v. Panzardi Alvarez*, 816 F.2d 813, 815 n.1, 817-18 (1st Cir. 1987) (indicating that application of local rule limiting *pro hac vice* appearances to one per year so as to deny out-of-jurisdiction counsel to defendant indicted in two matters offends Sixth Amendment guarantee of effective assistance of counsel).

46. See *Pro Hac Vice Admission*, *supra* note 45, at 21:2006.

47. On the limitation of *pro hac vice* admission to litigation, see, for example, *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986), in which the court noted the inability of a lawyer to obtain *pro hac vice* admission for nonlitigation work. See *id.* at 162 n.1. In the notorious case of *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), a New York lawyer who performed legal services in California at the request of clients who controlled a California corporation that was involved in arbitration in San Francisco engaged in unauthorized practice and could not recover fees for work there. See *id.* at 7. *Pro hac vice* admission was unavailable because arbitration does not involve a court appearance. See *id.* at 6, 9. Thus, there was no method that the court would recognize (including association with local counsel) by which the out-of-state lawyer could have conducted the California arbitration short of being fully admitted to the California bar. California, along with all other Sun Belt states, does not admit lawyers “on motion”—that is, admit to local practice a lawyer admitted elsewhere, unless the lawyer succeeds in qualifying for and passing the state’s bar examination. See, e.g., Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional*

available generally for such litigation-like activities as mediation or arbitration, despite the possible close resemblance of some such proceedings to litigation.<sup>48</sup>

Some jurisdictions do treat a *pro hac vice* admission as, in effect, submission to the disciplinary authority of the state—but perhaps only with respect to conduct that occurs in connection with that very proceeding.<sup>49</sup> In other jurisdictions, which lack comparable disciplinary

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*Lawyers*, 36 S. TEX. L. REV. 665, 682 n.47 (1995) [hereinafter Wolfram, *Sneaking Around*]. Improbably enough, however, some courts have held that representing a client in arbitration does not constitute the practice of law, and thus may be done by a lawyer from outside the jurisdiction in which the arbitration is held. *See, e.g.*, *Siegel v. Bidas Sociedad Anonima Petrolera Industrial y Comercial*, No. 90 Civ. 6108 (RJW), 1991 WL 167979, at \*5 (S.D.N.Y. Aug. 19, 1991) (holding that a lawyer not admitted in New York was entitled to recover legal fees for services in representing client in New York arbitration).

A recent Rhode Island Supreme Court ruling might hold out the possibility of considering requests by transactional lawyers for situation-by-situation admission *pro hac vice* for non-litigation work within the state. *See In re Ferrey*, 774 A.2d 62, 64 (R.I. 2001) (providing an indication that the state's supreme court will, on case-by-case basis, exercise discretion to grant prospective-only authority to lawyer admitted in another state to engage in law practice in-state before state or municipal administrative agencies, boards, or commissions). The state supreme court emphasized that only it, and no other court in the state, could exercise that discretion. *See id.*

A broader power of nonlitigation *pro hac vice* admission may also be a possibility (although thus far untested) under one possible reading of New York's recently amended regulation on *pro hac vice* admission. *See* N.Y. COMP. CODES R. & REGS. tit. 22 § 520.11(a)(1) (2000) (providing that out-of-state lawyer in good standing may be admitted *pro hac vice* "in the discretion of any court of record, to participate in any matter in which the attorney is employed" with no stated limitation of practice to litigation "matters"). The regulation's amendment had been occasioned by a highly restrictive ruling purporting to limit *pro hac vice* admissions to the trial of a case only, thus precluding participation in pretrial work. *See Largeteau v. Smith*, 603 N.Y.S.2d 62, 63-64 (App. Div. 1993). *But see* *Johnson v. Mesch Eng'g, P.C.*, 624 N.Y.S.2d 710, 710 (App. Div. 1995) (ruling of different appellate court explicitly rejecting *Largeteau* and holding that *pro hac vice* admission applied to pretrial discovery as well as trial itself); *People v. Leslie*, 662 N.Y.S.2d 761, 764-65 (App. Div. 1997) (ruling by another appellate court following *Johnson* and rejecting *Largeteau*).

48. *See supra* note 47.

49. *See, e.g.*, WIS. SUP. CT. R. 20:8.5(a) (stating that disciplinary authority extends to lawyer generally admitted to bar as well as to "[a] lawyer allowed by a court of this state to appear and participate in a proceeding in that court . . . for conduct that occurs in connection with that proceeding"). The West Virginia Supreme Court in the *Allen* decision alluded to its prior, unpublished decision in a 1993 case where it had exercised disciplinary jurisdiction over a lawyer admitted in another state on the ground that his frequent *pro hac vice* appearances constituted "regularly engag[ing]" in practice in the state. *See Allen*, 479 S.E.2d at 335. The court's brief description does not indicate whether there was any connection between the charged offenses and the *pro hac vice* work. A Maryland bar rule, quoted in *Attorney Grievance Commission v. Hyatt*, 490 A.2d 1224 (Md. 1985), referred even more broadly to disciplinary jurisdiction over both locally admitted lawyers as well as "'a member of the bar of any other state . . . who is employed as counsel in any case'" pending before any court or administrative agency of the state, regardless of admission *pro hac vice* or of the regularity of such admissions. *Id.* at 1227 (quoting Maryland bar rule defining "attorney").

The Indiana Supreme Court in *In re Fletcher*, 655 N.E.2d 58 (Ind. 1995) (per curiam), spoke broadly of its inherent judicial power to regulate any lawyer who practices law in the state

power, apparently the only remedies are those available in the trial court in which the *pro hac vice* lawyer has been admitted or is applying for admission. In general, trial courts are recognized as having discretion to revoke a *pro hac vice* appearance for good cause.<sup>50</sup> Motions for *pro hac vice* admission can also be denied in the discretion of the court,<sup>51</sup> and occasionally are denied on the ground that the lawyer's past misconduct threatens to disrupt the proceedings.<sup>52</sup> And courts in which *pro hac vice* lawyers appear can presumably impose on such lawyers contempt or procedural sanctions of the same kind and on the same terms as are permitted with locally-admitted lawyers.<sup>53</sup> But, because in most states

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based on its own rule of admission giving it power over lawyers locally admitted and a lawyer "who practices law in this State." *Id.* at 59. That certainly would include lawyers locally admitted but also others: "Although [respondent's] *pro hac vice* admission provides convenient empirical evidence supporting our finding that he was engaged in the practice of law in this state, our disciplinary jurisdiction is not grounded solely in his *pro hac vice* admission. It also arises from his having practiced law in this state." *Id.* at 60-61. In fact, in *Fletcher*, the lawyer admitted *pro hac vice* was held subject to discipline for making a knowing false statement of fact to the judge in the very case in which he was admitted. *See id.* at 59, 61. However, in *In re Murgatroyd*, 741 N.E.2d 719 (Ind. 2001) (per curiam), the Indiana Supreme Court exercised its jurisdiction to accept the agreed judgment of two California-admitted lawyers who had solicited Indiana clients without compliance with the Indiana professional rules. *See id.* at 720, 722. The agreed judgment consisted of an injunction ordering compliance with all Indiana professional rules in the future, including those dealing with solicitation. *See id.* at 722-23.

50. *See, e.g.*, *Eagan v. Jackson*, 855 F. Supp. 765, 791 (E.D. Pa. 1994) (revoking admission *pro hac vice* of New Jersey lawyer representing incompetent ward for lawyer's failure to inform court of his fee-splitting agreement with guardian of ward, who supported request by lawyer for enhanced fee; matter also referred to New Jersey court with jurisdiction over estate of ward for possible report to New Jersey ethics agency); *Royal Indem. Co. v. J.C. Penney Co.*, 501 N.E.2d 617, 622 (Ohio 1986) (upholding revocation based on evidence that firm misrepresented facts about existence of documents sought in subpoena duces tecum); *Filppula-McArthur v. Halloin*, 622 N.W.2d 436, 449 (Wis. 2001) (upholding revocation as not abuse of discretion on evidence that lawyer repeatedly exceeded limits on proper forensics and ignored court's rulings and, in another case, based on revocation of *pro hac vice* admission in first case).

51. *See, e.g.*, *Leis v. Flynt*, 439 U.S. 438, 441-42 (1979) (per curiam) (holding that lawyer has no due process right to admission *pro hac vice*, but that such rests in sound discretion of court).

52. *See, e.g.*, *Kohlmayer v. Nat'l R.R. Passenger Corp.*, 124 F. Supp. 2d 877, 878 (D.N.J. 2000) (upholding magistrate's denial of *pro hac vice* admission where lawyer's past conduct in several recent cases was "uncivilized and unprofessional and . . . resulted in reprimands, mistrials and wasted judicial time"). Two courts have strongly intimated that they will exercise a power to enjoin a lawyer who has engaged in past inappropriate litigation behavior from *pro hac vice* appearance in the future. *See Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 56 (Del. 1993) (inviting Texas lawyer Joseph Jamail to make "a voluntary appearance" to explain why he should not be barred from appearing in Delaware following egregious misconduct during Texas representation of deponent in Delaware-based litigation); *Fletcher*, 655 N.E.2d at 61 (intimating that disciplinary sanctions against *pro hac vice* lawyer might include injunctive relief, apparently against further such appearances).

53. *See, e.g.*, *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 562 (Fed. Cir. 1996) (holding that district court had inherent power to sanction *pro hac vice* lawyer, based on lawyer's misrepresentation to court, by preventing counsel from appearing before court on same

the law on the inherent power of a court to discipline lawyers confines the subject of lawyer discipline to the state's supreme court,<sup>54</sup> the trial courts of the state do not have a general, inherent power to discipline *pro hac vice* lawyers. The available possibilities thus would obtain only in a narrow range of cases, situations that are unlikely to have much meaning under the facts of the *Allen* decision. If one or more of the lawyers involved in that decision had been admitted to practice in West Virginia *pro hac vice*, the court in which the admission had occurred could respond to complaints about the lawyer's conduct in that very litigation.<sup>55</sup> Thus, courts could respond to the *pro hac vice* lawyer's involvement in solicitation in the very case in which the lawyer was specially admitted. And, perhaps, a court could deny admission *pro hac vice* in a future case because of a demonstrated practice of impermissible solicitation within the state in prior instances.<sup>56</sup>

The *pro hac vice* extension of the local admission rule is widely recognized, but its disciplinary implications are even more modest than the right of courtroom audience that it grants. Typically, disciplinary objections can be lodged only with the court in which the litigation is pending, and which entered the order of special admission. That court, of course, is not the regularly constituted lawyer-disciplinary authority, and the presiding judge may have neither relevant experience nor disposition to serve as such. In fact, some decisions indicate that the presiding judge should *not* attempt to exercise broad disciplinary powers, but should single-mindedly confine herself to complaints that threaten the ability of a party to receive a fair trial in the pending matter or the ability of the tribunal to provide one.<sup>57</sup> The fact that a disciplinary offense may have

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basis in future); *Bank of Haw. v. Kunimoto*, 984 P.2d 1198, 1213, 1219 (Haw. 1999) (holding that state's trial courts have inherent power to impose sanctions for abusive litigation practices—here, warranting revocation of *pro hac vice* status and requiring lawyers in any future *pro hac vice* application to reveal revocation).

54. See generally WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.2.4 (stating that the great majority of state supreme courts refuse to permit lower courts to exercise the supreme court's inherent power to discipline lawyers).

55. See *Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317, 333 n.24, 336 (W. Va. 1996).

56. Cf. *Kohlmayer*, 124 F. Supp. 2d at 883 (upholding denial of *pro hac vice* admission because of disruptive trial antics in prior cases). The prospect of denial of future *pro hac vice* admission requests by the offending lawyers might have led the West Virginia court in its *Allen* decision to go on at such length about the impermissible solicitation that, in the end, the court held was beyond its sanctioning power. See *Allen*, 479 S.E.2d at 324-36.

In the federal system, the inherent power of a trial court to impose sanctions on a *pro hac vice* lawyer may be more expansive than the corresponding powers of state court judges. See, e.g., *Baldwin Hardware Corp.*, 78 F.3d at 562.

57. See, e.g., *Hahn v. Boeing Co.*, 621 P.2d 1263, 1266-67 (Wash. 1980) (en banc) (holding that trial court had no disciplinary authority, which was reserved exclusively to supreme court, and

caused serious consequences of another kind—such as harm to nonparties in the state—would presumably not warrant intervention by the trial court. In any event, the sanctioning power that the *pro hac vice* court can exercise is quite limited. It essentially consists (at the extreme) of the power to prohibit the lawyer from proceeding further with the particular representation that is the sole subject of the lawyer's local admission and, when warranted, contempt or procedural sanctions.<sup>58</sup> Due to the exclusive power of the jurisdiction's supreme court to administer discipline,<sup>59</sup> presumably the *pro hac vice* court cannot formally prohibit the lawyer from representing all clients in the state in the future (a sanction functionally equivalent to *pro hac vice* disbarment). On the other hand, at least one state supreme court has intimated that it would itself deny the right of a lawyer to appear in the state *pro hac vice* in the future because of perceived past misconduct.<sup>60</sup>

In sum, in the usual case and in the vast majority of jurisdictions following the traditional local admission rule, there are few alternative remedial devices available to impose sanctions on a nonlocal lawyer. Many of the available devices would be wielded by tribunals not normally entrusted with lawyer discipline, and the remedy would often be quite limited and otherwise unlike the remedies available in formal lawyer-discipline proceedings. For the most part, professional discipline is, if indirectly, quite emphatically limited to the offending lawyer's "home" state, the state in which the lawyer is indeed admitted to practice. There, as I next discuss, there is no reticence about geography and discipline; in a radical reversal of form, at least the professional theory broadly admits that a home state lawyer is subject to professional discipline without regard to the place where the lawyer's allegedly wrongful act occurred or where its effects were felt. But, as will be next discussed, there are reasons to doubt that the home state disciplinary authorities will be regularly interested in visiting their customary level of diligent prosecution of the locally admitted lawyer for conduct in another jurisdiction.

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thus no power to authorize inquiry into whether lawyer applying for admission *pro hac vice* had solicited clients in that case). For further discussion, see *supra* note 49 and accompanying text.

58. See, e.g., *Macdraw, Inc. v. CIT Group Equip. Fin., Inc.*, 138 F.3d 33, 37, 39 (2d Cir. 1998).

59. See *supra* note 54 and accompanying text.

60. See *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 56-57 (Del. 1993) (stating that, while no clear mechanism existed to deal with objectionable advocacy by Texas lawyer in deposition taken in Texas for Delaware litigation in which lawyer was defending individual nonparty deponent, court would consider whether lawyer would ever be admitted *pro hac vice* in Delaware litigation in future).



#### IV. HOME STATE CONCERN WITH OUT-OF-STATE ACTIVITIES OF LOCAL LAWYERS

##### A. *Home State Disciplinary Policies and Out-of-State Lawyer Activities*

We turn, then to consider the other, although somewhat theoretical, possibility: that a lawyer soliciting clients (or committing another disciplinary offense) away from her state of admission would nonetheless be disciplined at “home.” Under the facts in the *Allen* decision, “home” would be the District of Columbia where two of the lawyers involved in the West Virginia solicitation were admitted to practice.<sup>61</sup> Deferring for a moment the question of the extent of enforcement, all American jurisdictions assert at least the theoretical power to punish acts of their locally-admitted lawyers, even if the acts occurred and caused injury outside the state.<sup>62</sup>

At one level, such a theoretical stance is not surprising. Unlike, for example, prosecution for criminal offenses,<sup>63</sup> discipline of lawyers is suffused with concern about making accurate predictions about future wrongdoing on the part of the offending lawyer. One of the theories driving professional discipline is that it seeks to protect clients, the

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61. See *Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317, 320 (W. Va. 1996) (stating that disciplinary charging papers indicated that “Phillip B. Allen was licensed to practice in Ohio and Illinois and that John P. Coale and Greta C. Van Susteren were licensed to practice in the District of Columbia”).

62. See *Developments in the Law: Lawyers’ Responsibilities and Lawyers’ Responses*, 107 HARV. L. REV. 1547, 1586 (1994). In fact, in *Allen* itself, the West Virginia court intimated that continuation of an initial West Virginia instance of solicitation that was carried forward in a hospital room in Pittsburgh, Pennsylvania, would be within the regulatory power of the West Virginia court:

Thus, we hold that a lawyer who initially contacts a prospective client who is located in West Virginia regarding a cause of action that may be initiated in West Virginia courts is subject to discipline in this State if he or she violates the West Virginia Rules of Professional Conduct with respect to such prospective client, even if the conduct constituting a violation occurs outside of our State.

*Allen*, 479 S.E.2d at 324.

63. It has, of course, always been the case that an objective, perhaps the principal one, of the law of crime is that of general and specific deterrence. See, e.g., Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in FOUNDATIONS OF CRIMINAL LAW 60, 60 (Leo Katz et al. eds., 1999). Despite that effort—which is demonstrably not entirely successful—the criminal law and the criminal justice system do not generally purport to “certify” persons as law-abiding. But, that is sometimes claimed to be one of the hallmarks of the governmental process of admission to law practice and professional discipline of lawyers, which presumably necessitates a more or less constant vigilance about the character and other competence of an admitted lawyer. See, e.g., *People v. Pautler*, 35 P.3d 571, 582 n.13 (Colo. 2001) (quoting Colorado court rule stating that “[a] license to practice law is a proclamation by this Court that its holder is a person to whom members of the public may entrust their legal affairs”).

public, courts, and the legal system against lawyers who, by their professional misconduct, have shown themselves unwilling or unable to abide by mandatory constraints spelled out in the lawyer codes, thus presenting a clear threat of repetition of such violations.<sup>64</sup> That may be particularly important to a public that might legitimately assume that a person who was initially accepted into the bar after purportedly thorough scrutiny of the lawyer's moral and intellectual fitness retains a kind of certificate of state approval until stripped of that standing.<sup>65</sup> In making that assessment on the occasion of adjudicating a disciplinary charge, courts place significant emphasis upon the perceived character of the lawyer in question. This is done in an attempt to determine whether the lawyer has the kind of character traits that assure that she is minimally worthy of being entrusted with the responsibilities of law practice or, differently, appears to be burdened with a major character defect that portends further ethical lapses.<sup>66</sup>

For those broad purposes, disciplinary authorities correctly perceive that a lawyer should be held accountable for wrongful professional acts wherever they might occur. Perhaps most clearly, a lawyer who commits a serious crime<sup>67</sup> outside the jurisdiction presents a professional risk

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64. See, e.g., ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS R. 1.1 (1986) [hereinafter ABA STANDARDS FOR SANCTIONS] ("The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession."); WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 3.1, at 80-82 (describing general purposes of lawyer discipline).

65. See *Theard v. United States*, 354 U.S. 278, 281 (1957) ("The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do."); see also John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1023 (1982). Professor Leubsdorf describes a professional ideology that:

Clients were to entrust their affairs to the professional judgment of counsel, who would serve them with selfless devotion. In turn, the legal profession would protect clients from ignorance and unreliability by preventing them from hiring anyone not enlightened by a legal education and warranted by bar membership. Furthermore, the bar would prevent abuses by its own members through the establishment and enforcement of rules . . .

*Id.* (footnotes omitted).

66. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards For Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 54-55 (1998).

67. On the types of criminal offenses that may result in professional discipline, see WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 3.3.2, at 92-94 (providing a general survey of crimes that may result in professional discipline); *Criminal Conduct*, Laws. Man. on Prof. Conduct (ABA/BNA), at 101:301-06 (July 18, 2001) (providing a similar list); see also ABA STANDARDS FOR SANCTIONS, *supra* note 64, R. 5.11(a) (specifying types of serious criminal conduct warranting disbarment such as theft, fraud and extortion); *id.* R. 5.12 (stating that criminal conduct not specified in R. 5.11 generally warrants suspension); *id.* R. 5.13 (stating that lawyers who knowingly

equal to that posed by a lawyer whose criminal acts happened to be committed within the state of admission. Thus, courts uniformly hold that the place where a serious crime is committed is irrelevant for purposes of imposing professional discipline in the state where the lawyer is admitted.<sup>68</sup> That notion, however, is not limited to lawyer crimes. A home state court may also express concern over the conduct of a lawyer who engages in a civil wrong, such as fraud,<sup>69</sup> or violates a lawyer code such as by engaging in unauthorized practice,<sup>70</sup> even if the act constituting the noncriminal wrong is committed outside the state in which the lawyer is admitted.<sup>71</sup> The notion is enshrined in a provision of ABA Model Rule 8.5(a), which has been widely adopted and which provides that “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”<sup>72</sup>

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engage in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation that adversely reflects on the lawyer’s fitness to practice, should be reprimanded).

68. See, e.g., *Office of Disciplinary Counsel v. Cashman*, 629 P.2d 105, 108 (Haw. 1981) (per curiam) (indicating that conversion of client’s funds in California is a basis for discipline in Hawaii); *Attorney Grievance Comm’n v. Childress*, 770 A.2d 685, 694, 696-97 (Md. 2001) (indicating that despite reversal of federal court conviction on appeal, evidence sufficiently showed that lawyer had violated Virginia criminal statute against taking “indecent liberties” with children in Internet-arranged sexual liaisons with underage girls); *In re Scallen*, 269 N.W.2d 834, 839 (Minn. 1978) (concluding that locally admitted lawyer’s commission of fraud in Canada was basis for local discipline).

69. An interesting testing case is *In re Wade*, 526 A.2d 936 (D.C. 1987). Lawyer Wade, who was apparently admitted only in the District of Columbia but who was not a resident and did not maintain an office there, nonetheless maintained his D.C. license in “active” status. See *id.* at 938. While resident in Massachusetts, he misappropriated and converted money entrusted to him by a client, whom he was representing although not yet admitted in that state. See *id.* at 937-38. The D.C. court first rejected Wade’s argument that he was not subject to D.C.’s disciplinary power because he did not fit within what the court agreed was the relevant jurisdictional rule, which subjected to D.C. discipline “[a]ny attorney who engages in the practice of law within [D.C.]” *Id.* at 938 (quoting D.C. BAR R. XI, § 1). Despite the infelicitous working of the rule, the court held that maintaining active status constituted such activity, and it then proceeded to disbar Wade. See *id.* at 939-40.

70. See, e.g., *Office of Disciplinary Counsel v. Mbakpuo*, 652 N.E.2d 976, 977-78 (Ohio 1995) (affirming suspension of a lawyer who, among other offenses, practiced law from an office in the District of Columbia, where the lawyer was not admitted).

71. See generally MODEL DISCIPLINARY RULES, *supra* note 7, R. 9(A)(2) (stating that grounds for discipline include “engag[ing] in conduct violating applicable rules of professional conduct of another jurisdiction”); see also *People v. Schindelar*, 845 P.2d 1146, 1147 (Colo. 1993) (en banc) (per curiam) (stating that “an attorney who is a member of the bar of this state must answer for her professional misconduct even if the misconduct occurs in another jurisdiction”); *In re Howes*, 940 P.2d 159, 163, 171 (N.M. 1997) (permitting discipline of locally-admitted lawyer for acts while functioning as federal prosecutor in District of Columbia).

72. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 8.5(a) (2001) [hereinafter MODEL RULES]. The following sentence in Rule 8.5(a) indicates that, in at least some such instances of nonlocal acts, the lawyer would have been acting as a lawyer in another jurisdiction: “A lawyer may

Rule 8.5(a) and the decisions are analytically coupled with an even broader notion under which a lawyer's acts can constitute the basis for professional discipline in the state of admission even if the "lawyer" acts in a context having nothing to do with the practice of law (and again, as stated above, even if the act is not criminal).<sup>73</sup> For example, a person admitted to practice who is engaged full-time in a business that has nothing to do with law practice can be disciplined for wrongful acts committed in the course of that other work, when the act bears the necessary predictive quality about the lawyer's future practice.<sup>74</sup> Typically, such discipline occurs under loosely-worded "catch-all" provisions of the lawyer codes, sanctioning such amorphous disciplinary offenses as "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation"<sup>75</sup> or "that is prejudicial to the administration of justice."<sup>76</sup> Those, obviously, are offenses that may occur in a lawyer's many possible roles not related to law practice.<sup>77</sup> Interestingly, the only specific textual mention in the ABA *Model Rules of Professional Conduct* of impermissible acts beyond a home state's borders is Model Rule 5.5(a), with its prohibition against a lawyer's engaging in the unauthorized practice of law in another jurisdiction.<sup>78</sup>

In the case of a lawyer's *authorized* practice in another state, the extraterritorial concern of other states has indeed been formalized in recent decades, although in only a limited respect. In a former day, when it was otherwise, those concerned with bar regulation decried the fact that a lawyer who was disbarred or suspended in one state could

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be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct." *Id.*

73. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 3.3.4, at 97 & n.32.

74. See *id.* (describing broad acceptance of traditional view that lawyer is subject to professional discipline for conduct that lawyer engaged in outside his or her role as lawyer); see also *Ex parte Wall*, 107 U.S. 265, 274 (1883) (holding lawyer in contempt for participation in public lynching of prisoner taken from courthouse).

75. MODEL RULES, *supra* note 72, R. 8.4(c). Model Rule 8.4(b) already proscribes "commit[ing] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." *Id.* R. 8.4(b). Thus, Rule 8.4(c) obviously covers many acts of the described kind that are not also criminal.

76. *Id.* R. 8.4(d). The 1969 ABA *Model Code of Professional Responsibility* stated one further catch-all provision. It contained a proscription, of the ultimate in breadth, against engaging "in any other conduct that adversely reflects on [the lawyer's] fitness to practice law." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(6) (1969) [hereinafter MODEL CODE]. That phrase is not repeated in the 1983 ABA *Model Rules of Professional Conduct*.

77. On the concern that such broadly worded disciplinary rules not be used to extend the reach of specific disciplinary standards, see RESTATEMENT, LAWYERS, *supra* note 18, § 5 cmt. c.

78. See MODEL RULES, *supra* note 72, R. 5.5(a) (providing that a "lawyer shall not . . . practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction").

continue to practice law in any other state in which the lawyer was admitted.<sup>79</sup> The response has been the implementation of a system of reciprocal discipline.<sup>80</sup> In most states, regulations can now be found under which a locally admitted lawyer must promptly report to the state's bar disciplinary authorities any imposition of professional discipline in any other state in which the lawyer is admitted.<sup>81</sup> That is supplemented by systematic reporting by jurisdictions when they impose discipline, including to a national data bank maintained by the ABA.<sup>82</sup> Once reported, or otherwise discovered by local bar disciplinary

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79. See SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, ABA, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 116-21 (1970) [hereinafter CLARK REPORT].

80. See generally MODEL DISCIPLINARY RULES, *supra* note 7, R. 22 (setting out a model reciprocal-discipline rule); WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 3.4.6, at 115-17 (discussing system of reciprocal discipline). States also recognize discipline or sanctions imposed in federal courts for the purposes of reciprocal discipline. See, e.g., Miss. Bar v. Shah, 749 So. 2d 1047, 1049 (Miss. 1999) (en banc) (imposing reciprocal discipline on lawyer based on discipline imposed in federal bankruptcy court, under state rule so providing for sanctions imposed "by another jurisdiction"); State *ex rel.* Okla. Bar Ass'n v. Patterson, 28 P.3d 551, 561 (Okla. 2001) (per curiam) (imposing public censure where court felt that disbarment as reciprocal discipline was too harsh after lawyer was disbarred by federal appellate court). And, federal courts give respect to state adjudications of discipline in determining whether the lawyer should also be disciplined in federal court. See generally Theard v. United States, 354 U.S. 278, 282 (1957) (holding that, while a state's disbarment judgment "brings title deeds of high respect," the federal district court was not bound to accept ruling of state court if "right and justice" conflicted with upholding state findings).

The concept of reciprocal discipline is not new. See, e.g., People *ex rel.* Blackmer v. Campbell, 58 P. 591, 591 (Colo. 1899) (per curiam) (indicating that lawyer disbarred in Montana not eligible to be admitted in Colorado on basis of Montana license; Colorado license ordered revoked on strength of Montana disbarment). For a contemporary cognate in the same jurisdiction, see People v. Mattox, 862 P.2d 276 (Colo. 1993) (per curiam), where the Colorado Supreme Court ordered the suspension of a lawyer who failed to disclose on her application for admission to practice in state that she had been suspended from practice in another jurisdiction. See *id.* at 276-77. What is new is systematically paying attention to the possibility of discipline in other jurisdictions and, to a modest extent, providing for a national data-sharing network to allow earlier detection of other-state discipline.

81. See generally MODEL DISCIPLINARY RULES, *supra* note 7, R. 22(A) (requiring lawyer subject to discipline in another jurisdiction to notify local disciplinary agency "promptly"); COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, ABA, LAWYER REGULATION FOR A NEW CENTURY 85 (1992) [hereinafter MCKAY REPORT] (setting out a recommendation for such a system). Some jurisdictions apparently impose a broader reporting obligation, for example including imposition of procedural sanctions in another jurisdiction. See, e.g., Patterson, 28 P.3d at 560-61 (enforcing (through public censure) rule requiring lawyer to report sanctions (here imposed by out-of-state federal court) to state disciplinary office).

82. See MODEL DISCIPLINARY RULES, *supra* note 7, R. 16(I) (requiring disciplinary board to send notice of all public discipline against a lawyer to ABA's National Discipline Data Bank); see also WASH. RULES FOR LAWYER DISCIPLINE R. 11.2(c) (2001) (providing that notice of discipline is to be given to: (1) lawyer discipline agency in any jurisdiction where lawyer is believed admitted; (2) chief judge of local federal courts and federal court of appeals; (3) National Discipline Data Bank of the ABA; (4) the local bar news).

authorities, a process of imposing reciprocal discipline will be inaugurated.<sup>83</sup> Again, the implicit policy is that professional discipline in another state—including, of course, such discipline based on acts that occurred outside the home state—is also a matter of potential disciplinary concern in each other state in which the lawyer is admitted.

The fact that the violation consisted entirely of conduct that occurred outside the home state in which the proceeding for reciprocal discipline is pending does not preclude it.<sup>84</sup> The other-state violation may indicate indifference to professional obligations on the part of the lawyer that is a matter of concern in any state in which the lawyer is admitted. Yet, the local state's regulatory interests should receive appropriate recognition. That is found, for example, in the general approach that discipline will not be imposed if the offense is one that does not exist under the lawyer code of the state asked to impose reciprocal discipline.<sup>85</sup> Also, New York courts follow the approach in reciprocal-discipline cases<sup>86</sup> of imposing milder sanctions if the particular facts indicate that the interests of the state that first initiated disciplinary proceedings are—all other things considered—greater than local interests, such that the other state's determinations on discipline should be primary.<sup>87</sup> That approach would seem appropriate everywhere, at least where the initially imposed discipline adequately provides deterrence to the lawyer and protection to the public and public institutions, and if the circumstances indicate no significant risk of future misconduct in the state considering reciprocal discipline.

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83. See MODEL DISCIPLINARY RULES, *supra* note 7, R. 22.

84. See, e.g., *In re Carlson*, 489 S.E.2d 834, 835 (Ga. 1997) (per curiam) (indicating that lawyer's felony conviction in Kentucky for flagrant nonsupport of children there involves moral turpitude requiring disbarment in Georgia); *In re Repasky*, 731 N.Y.S.2d 84, 85 (App. Div. 2001) (per curiam) (imposing reciprocal discipline on New York lawyer, who was also admitted in Georgia, where he practiced and (apparently) where the offending acts of neglect occurred).

85. See, e.g., *In re Youmans*, 588 A.2d 718, 719 (D.C. 1991) (refusing to discipline lawyer admitted in both D.C. and New Jersey who was disciplined in latter state for offense of depositing client's advance fee payment into personal account instead of trust account, because D.C. rules would permit such deposit); *In re Lebbos*, 672 N.E.2d 517, 519 (Mass. 1996) (noting provision of Massachusetts disciplinary rules stating that reciprocal discipline is not proper if "the misconduct established does not justify the same discipline" in Massachusetts).

86. See *Repasky*, 731 N.Y.S.2d at 85.

87. See, e.g., *In re Beltre*, 565 N.Y.S.2d 84, 85 (App. Div. 1991) (per curiam) (noting the "generally accepted principle that the state where the respondent lives and practices law has the greater interest in the particular matter and the public policy considerations relevant to disciplinary action"). Such a result would seem particularly true in an instance, such as that being discussed, in which the lawyer is not admitted to practice in the jurisdiction.

### B. Home State Discipline and Choice-of-Law Considerations

The extraterritorial reach of a state's regulatory power necessarily poses the question of which state's regulation should apply with respect to lawyer conduct that has multijurisdictional aspects—wherever may be located the tribunal that must confront that question. The question, of course, is the familiar, and often difficult, one of choice of law.<sup>88</sup> For example, a lawyer who is admitted in the State of New Jersey and has an office there may be admitted *pro hac vice*<sup>89</sup> for the purpose of conducting litigation in, say, local courts in the District of Columbia. Imagine that the lawyer discovers information clearly indicating that the lawyer's client is engaged in a plot to defraud the opposing party in the course of settlement discussions. The lawyer code of New Jersey *requires* the lawyer to disclose the fraud if necessary to prevent it from occurring,<sup>90</sup> but the lawyer code of the District of Columbia *prohibits* disclosure in such circumstances.<sup>91</sup> There is, obviously, no way out: the lawyer cannot comply with both requirements.<sup>92</sup> Interestingly, until recently there was very little guidance in either New Jersey or the District of Columbia, or anywhere else, about how courts were to go about selecting the rule of decision on such facts in a disciplinary proceeding. Some intimation of

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88. See generally Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799 (1995) (providing a survey of choice of law concerns regarding lawyer discipline).

89. See *supra* notes 45-56 and accompanying text.

90. See N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(2) (1997). New Jersey Rule 1.6(b) states:

(b) A lawyer shall reveal such [otherwise confidential] information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

*Id.*

91. See D.C. RULES OF PROF'L CONDUCT R. 1.6(a)(1), (c)(1) (2000) (providing broad prohibition against revealing confidence or secret of a client, with no exception for acts of client threatening financial injury).

92. The ABA's 1983 Model Rules invented the notion of a lawyer's "noisy withdrawal" from a representation. See MODEL RULES, *supra* note 72, R. 1.6 cmt. 16 (2001) ("Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."). The concept is generally regarded, and properly so, as simply a less candid and more problematic method of permitting lawyer disclosure adverse to a wrongdoing client for self-protective reasons. See, e.g., 1 HAZARD & HODES, *supra* note 25, §§ 9.30-9.31.

how to proceed can be found in scattered decisions,<sup>93</sup> but lawyers have complained that general choice-of-law standards (ironically enough, the same indeterminate standards that lawyers must apply to legal questions involving multijurisdictional activities of their own clients) were unreasonably opaque and open-ended when applied to lawyer discipline.<sup>94</sup> In response, the ABA amended its Model Rule 8.5 in August 1993 and, in effect, adopted a proposed legislative rule to govern choice-of-law issues in lawyer discipline cases.<sup>95</sup> The rule has been criticized by scholars as simplistic and overly rigid.<sup>96</sup> To date it has been adopted in only a few jurisdictions, including the District of Columbia (the home jurisdiction of the drafter of the ABA's model rule on the subject).<sup>97</sup> The scholarly criticism of the extant ABA rule is

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93. See, e.g., *In re Gil*, 656 A.2d 303, 305 (D.C. 1995) (announcing rule that court would look to law of any jurisdiction in which lawyer could have been prosecuted in determining whether misconduct was "criminal act"); *In re Hoffman*, 379 N.W.2d 514, 517 (Minn. 1986) (per curiam) (employing governmental-interest analysis theory of choice of law to determine whether law of Minnesota, the residence and place of business of both lawyer and client and place of fee contract, or Alaska, where injury occurred and where worker compensation commission made award and had rule limiting lawyer's fee in such proceeding, should apply to question of whether fee was legal). Most of the few decisions that exist involve remedies other than lawyer discipline. See, e.g., *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 470-72 (W.D. Mich. 1997) (showing a choice of law analysis in determining applicability of attorney-client privilege); *Holbrook v. Andersen Corp.*, 756 F. Supp. 34, 39-40 (D. Me. 1991) (approving a settlement of minor's tort claim and determination of lawyer's fees); *Frost v. Lotspeich*, 30 P.3d 1185, 1186-87 (Or. Ct. App. 2001) (involving a controversy between Oregon and California lawyers over enforcement of a fee-splitting agreement); cf. 4 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 32.5, at 153-55 (4th ed. 1996) (discussing choice-of-law considerations in legal malpractice litigation). As with choice of law generally, on some occasions courts are able to ignore the issue because the lawyer codes in question are the same. See, e.g., *In re Howes*, 940 P.2d 159, 167-68 (N.M. 1997) (per curiam) (finding no conflict, where New Mexico anticontact rule was same as rule of District of Columbia, with respect to activities of locally-admitted lawyer serving as federal prosecutor in District of Columbia).

94. See generally Arvid E. Roach II, *The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics*, 36 S. TEX. L. REV. 907 (1995) (providing a defense and exposition of the ABA's new choice-of-law rule by its draftsman); Comm. on Counsel Responsibility, ABA, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229, 1237 (1990) (decrying absence of "very specific rules" on choice of law to guide lawyers).

95. See MODEL RULES, *supra* note 72, R. 8.5.

96. See, e.g., Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 787-88 (1995) (criticizing Model Rule 8.5(a) as then recently amended); Rensberger, *supra* note 88, at 833-35 (providing another criticism of Model Rule 8.5); Susanna Felleman, Note, *Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct*, 95 COLUM. L. REV. 1500, 1501 (1995).

97. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 8.5 (2000); ILL. RULES OF PROF'L CONDUCT R. 8.5 (1998); N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-105 (2001). The new D.C.



telling.<sup>98</sup> The world would, of course, be a better place if it were possible to craft clear and workable choice-of-law rules for lawyers' practice (just as it would be for any other business group whose work touches on more than one jurisdiction). But the ABA rule is neither as clear as is advertised nor workable in many possible applications. In any event, the specifics of a choice-of-law rule for lawyer discipline are grist to be ground on another occasion.<sup>99</sup>

The overall contemporary picture, then, is anomalous. The lawyer codes themselves are worded both vaguely and broadly so as to spread their regulatory net over a very wide array of lawyer behavior, including (at least potentially) much conduct that is not committed in the course of or even with a direct relationship to law practice.<sup>100</sup> Given regulatory concern about a lawyer's character and future threat to clients and others, that net is not bounded by state, or even national, lines of governmental authority. For the purpose of both the specific and the catch-all provisions of the lawyer codes, it is not decisive that the offending conduct occurs in-state or out-of-state.<sup>101</sup> Yet, with respect to regulatory jurisdiction, a state following traditional doctrine will only entertain a proceeding to impose discipline if the lawyer is locally admitted, wherever the offending acts may have occurred.<sup>102</sup> Local acts, apparently regardless of their egregiousness or their threat to local persons or institutions, are not subject to the disciplinary power of local courts (again, in the absence of local admission of the offending

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rule continues the concept of local admission in amended D.C. RULES OF PROF'L CONDUCT R. 8.5(a):

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction *where the lawyer is admitted* for the same conduct.

*Id.* (emphasis added). The new D.C. Rule 8.5(b) then provides a rule governing choice of law in such instances, although the rule does not explicitly mention the possibility of disciplinary authority based on something other than local admission. *See id.* R. 8.5(b).

98. The few D.C. decisions under its choice-of-law rule have presented relatively straightforward choices, so that the rule must be considered as yet untested. *See, e.g., In re Gonzalez*, 773 A.2d 1026, 1027, 1029 (D.C. 2001) (indicating that a lawyer, admitted in both D.C. and Virginia, moved to withdraw from Virginia litigation by making disclosures that clearly violated the lawyer codes of both jurisdictions; lawyer code of Virginia applied to find violation).

99. The approach of the *Restatement* is to reject rigid approaches such as those of ABA Model Rule 8.5(a). *See* RESTATEMENT, LAWYERS, *supra* note 18, § 5 cmt. h (explicitly rejecting the approach of the amended Rule 8.5(a)). Instead, the Comment expresses a preference for the general approach of the conflicts restatement.

100. *See supra* notes 74-78 and accompanying text.

101. *See supra* note 72 and accompanying text.

102. *See supra* note 1 and accompanying text.

lawyer).<sup>103</sup> In short, a lawyer code of apparently powerful and inescapable application is, in the final analysis, confined in its operation to those lawyers who have been sufficiently law-abiding to go through the elaborate ceremonies required for local admission. As the waggish comment has it, there is something wrong with that picture.

#### V. HISTORICAL ORIGINS AND DEVELOPMENT OF THE LOCAL ADMISSION LIMITATION

The anomalous limit imposed by traditional doctrine on state power over lawyers admitted only elsewhere is self-inflicted, and it arose in a world of law practice and bar discipline very different from that now confronting lawyers and bar disciplinary officials. Unfortunately, it continues to be enforced largely in a casual and unthinking way. Without delving too deeply into the history of pre-twentieth century lawyer regulation, suffice it to say that the earliest forms of that regulation in the United States were entirely congenial with the local admission rule. Indeed, it would be anachronistic to expect that the rule then would have been anything else. The entire object of admission to a bar was acceptance into local practice before a particular court, an admission process that sometimes had to be repeated in many “bars” in the same state—perhaps on a county-by-county basis.<sup>104</sup> Correlatively, the entire point of lawyer discipline as it was then was to “dis-” bar a lawyer—to

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103. See *Attorney Grievance Comm’n v. Hyatt*, 490 A.2d 1224, 1227 (Md. 1985).

104. At an earlier time in Virginia, for example, it might have been necessary for a lawyer to obtain two certificates. One was from a court indicating that the lawyer was competent to practice law; apparently this could be obtained from any judge. The other was required to be obtained from a judge of the court of the county in which the lawyer resided, attesting to the lawyer’s good reputation. See *Leigh’s Case*, 15 Va. (1 Munf.) 468, 481 (1810). The latter certificate, obviously, was to assure a more firmly grounded judicial attestation about reputation.

remove his<sup>105</sup> name from the list of those enrolled and thus authorized to practice before the local court.<sup>106</sup>

Over time, the notion developed that local admission was exclusive, in two senses. First, the admitted lawyer enjoyed the positive advantage of right of audience before the court. Second, and eventually of great competitive import for lawyers, that permission was accompanied by a judge-made rule of state constitutional law that left judges with the exclusive power to delineate exclusive rights for those lawyers who had been admitted to the court's bar.<sup>107</sup> For most of American legal history until the end of the nineteenth century, there was no indication that this exclusive right extended beyond the courthouse. For the most part, formally-admitted lawyers and only those lawyers could represent clients in court.<sup>108</sup> It has only been within the last century, that courts developed the much more ambitious project of excluding nonadmitted persons (including nonadmitted lawyers) from practicing law *outside* the courthouse.<sup>109</sup> It is this regulatory realm that has come to be encased in

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105. We have been taught to believe there were no "her" lawyers in those early times, and that the first woman lawyers were admitted to practice only late in the nineteenth century. *See, e.g.,* WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 1.4.3, at 11-12 (stating "[a]t common law women were ineligible to practice law" and implying that first female American lawyers were admitted in the 1870s). That understanding of history is apparently wrong, or at least underinclusive, in that it ignores earlier (if, perhaps, not formally-licensed) women practitioners. A historian has shown that there were many women who practiced law in colonial times, and many of them enjoyed illustrious and successful professional careers as legal practitioners. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 3-38 (1986). It may be, however, that such pioneering practitioners flourished in work that did not require formal admission to the bar, such as law-office practice, or in jurisdictions where admission requirements were either momentarily relaxed or nonexistent.

106. Disbarment was a concept carried over from colonial England. *See Ex parte Burr*, 4 F. Cas. 791, 794 (C.C.D.C. 1823) (No. 2186) (citing English precedents to demonstrate that power of court to discipline lawyer was carried to Maryland, the state whose law was applicable in the District of Columbia, as part of English common law). Instances of disbarment are found among early postcolonial decisions of the state and federal courts. *See, e.g.,* *United States v. Porter*, 27 F. Cas. 595, 597 (C.C.D.C. 1812) (No. 16,072); *In re Anonymous*, 7 N.J.L. 162, 164 (1824). The lesser sanction of temporary *suspension* from practice for less serious professional offenses was an alternative remedy. *See, e.g., Burr*, 4 Fed. Cas. at 793 (citing Maryland statute of 1719 providing for disbarment, temporary suspension, or fine not exceeding 4000 pounds of tobacco); *Reilly v. Cavanaugh*, 32 Ind. 214, 218 (1869). Only in the latter part of the twentieth century did courts exercise much imagination in shaping remedies beyond disbarment or suspension to deal with particular kinds of lawyer misconduct and problems. *See* WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 3.5.7, at 139-41 (discussing alternatives to disbarment or suspension, such as conservatorship, probation and supervised practice, retraining, costs, fines, and other monetary sanctions).

107. *See* Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation: The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 3 (1989) [hereinafter Wolfram, *Lawyer Turf*].

108. *See, e.g.,* WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 15.1.1, at 824.

109. *See id.* § 15.1.3, at 837-45.

the law of unauthorized practice—a realm over which courts both have created powerful tools for enforcement and have claimed an exclusive right to define its boundaries.<sup>110</sup> The net effect was that nonadmitted lawyers and laypersons who wished to provide law-related services that were judicially defined as the unauthorized practice of law were denied both the right of audience as well as the right of out-of-court representation extended to locally-admitted lawyers. The development of that exclusionary notion of unauthorized practice did not begin in American law until the late-nineteenth and early-twentieth centuries.<sup>111</sup> It was only recently that doctrines were developed precluding nonlawyers from providing what we have come to think of as exclusively “lawyer services” in nonlitigation work. During most of American history prior to the twentieth century, a great deal of transactional work—such as the preparation of deeds, mortgages, bonds, contracts, wills, and similar documents—was performed by nonlawyers, such as notaries public, justices of the peace, minor courthouse officers, or simply literate men and women with copies of ubiquitous form books at hand.<sup>112</sup>

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110. See RESTATEMENT, LAWYERS, *supra* note 18, § 1 cmt. c (describing holdings in many states that state constitutional power of courts to regulate lawyers is exclusive of other branches of state government); Eugene Gressman, *Inherent Judicial Power and Disciplinary Due Process*, 18 SETON HALL L. REV. 541, 542 (1988); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 801 (1992); Wolfram, *Lawyer Turf*, *supra* note 107, at 6-7 (generally describing and critiquing negative aspect of inherent-powers doctrine). On use of the negative-power concept to strike down legislative attempts to reshape the notion of unauthorized practice, see *Martinez v. Albuquerque Collection Services, Inc.*, 867 F. Supp. 1495 (D.N.M. 1994), applying New Mexico constitutional law and striking down a statute purporting to regulate the unauthorized practice of law by a collection agency as interfering with the inherent power of the state’s supreme court. See *id.* at 1503; cf. *Haymond v. Lundy*, No. CIV.A. 99-5048, 2000 WL 1824174, at \*1-2 (E.D. Pa. Dec. 12, 2000) (applying Pennsylvania law, holding that state statute permitting claim against state bar member for aiding and abetting unauthorized practice offends state supreme court’s exclusive power to regulate lawyers and is unconstitutional under state constitution). Only rarely will a state’s constitution expressly confer on its highest court jurisdiction to regulate the unauthorized practice of law. See, e.g., IND. CONST. art. 7, § 4 (granting state supreme court original jurisdiction with respect to “the unauthorized practice of law”). Occasional decisions will accept legislative enactments dealing with unauthorized practice on the ground of comity. See, e.g., *Unauthorized Practice of Law Comm. v. Employers Unity, Inc.*, 716 P.2d 460, 464 (Colo. 1986) (en banc) (holding constitutional a statute that confirmed the fifty-year-old practice of nonlawyers to represent clients before state department of labor).

111. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 15.1.1, at 825-26. At the beginning of the twenty-first century, the American doctrine of unauthorized practice, as applied to out-of-court work by nonlawyers, was generally much more preclusive of nonlawyer interference with money-making opportunities for lawyers than is true of the law of virtually any other industrialized country.

112. See CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 4-5 (1966). Perennial best sellers during a great part of the eighteenth and nineteenth centuries in America were variations on the English concept of a “conductor generalis”—a formbook that was designed (almost certainly by one or more lawyer authors, as they invariably claimed) to be used in most of the everyday drafting

While most modern instances of unauthorized practice involve entirely uncredentialed nonlawyers,<sup>113</sup> it has long been recognized that lawyers who are otherwise credentialed may themselves offend unauthorized practice restrictions. A violation occurs when a lawyer admitted in, say, the District of Columbia, attempts to practice law in, say, West Virginia. That notion is expressed in the lawyer codes of apparently every state,<sup>114</sup> by means of the rule that prohibits a lawyer locally admitted from practicing in another jurisdiction in circumstances constituting the unauthorized practice of law where the practice occurs.<sup>115</sup> Because activities of a D.C. lawyer practicing law in West Virginia without a local license would constitute unauthorized practice, one might expect to find instances of enforcement at least somewhat proportional to the extent of such unauthorized across-borders practice. In fact, reported decisions involving home state prosecution of such an offense are extremely rare.<sup>116</sup> On the other hand, anecdotal and impressionistic evidence indicates that such unauthorized out-of-state practice by lawyers, if not entirely commonplace, is probably at least

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situations that had legal significance. See, e.g., ANONYMOUS, *A NEW CONDUCTOR GENERALIS* (Albany 1803). The long title of the work continues "Being a Summary of the Law Relative to the Duty and Office of Justices of the Peace, Sheriffs, Coroners, Constables, Jurymen, Overseers of the Poor, etc., etc. With . . . a Variety of Practical Forms . . . Which Will Be Found Useful to Citizens, Lawyers and Magistrates." *Id.* The anonymous author is identified on the title page only as "A Gentleman of the Law." *Id.* The earliest of such a *Conductor Generalis* was printed in Philadelphia in 1722. See Alfred L. Brophy, "Ingenium Est Fateri Per Quos Profeceris:" *Francis Daniel Pastorius' Young Country Clerk's Collection and Anglo-American Legal Literature 1682-1716*, 3 U. CHI. L. SCH. ROUNDTABLE 637, 640 n.5 (1996). These were near copies of works of the same name that were quite popular in England during the same period. See Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1097-98 (1994).

113. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 15.1.3, at 836-37.

114. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 1-300(B) (1994); D.C. RULES OF PROF'L CONDUCT R. 5.5(a) (2000); W. VA. RULES OF PROF'L CONDUCT R. 5.5(a) (2001); MODEL CODE, *supra* note 76, DR 3-101(B) & EC 3-9 (1969). See generally *Out-of-State Attorneys*, Laws. Man. on Prof. Conduct (ABA/BNA), at 21:2001 (Nov. 22, 2000).

115. See generally MODEL RULES, *supra* note 72, R. 5.5(a) ("A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction . . .").

116. For such rare instances, see *In re Kennedy*, 605 A.2d 600 (D.C. 1992) (per curiam), where a D.C.-admitted lawyer was suspended for a particularly egregious attempt to open an office in Maryland for the full-time practice of law without being admitted there, see *id.* at 601, 605, and *In re Schrader*, 523 S.E.2d 327 (Ga. 1999) (per curiam), where the Georgia Supreme Court suspended a lawyer admitted in Georgia but not New York, following a New York conviction for filing a probate matter in New York without obtaining admission *pro hac vice*, even though the facts showed that the lawyer had moved to New York and was in the process of applying for admission generally, see *id.* at 327-28.

widespread.<sup>117</sup> Occurring outside the courthouse, there is no ready judicial monitor. Being of questionable legality, it presumably does not get trumpeted about by the peripatetic practitioner. Like most surreptitious activities, it is unlikely that reliable statistics on incidence could be generated. If the intuited statistic is accurate, why, then, the lack of in-state enforcement? The reasons, which I have speculated about elsewhere,<sup>118</sup> probably have much to do with home state regulatory interests (as well as the relative absence of complaints from either clients or lawyer colleagues). Even if an offense of unauthorized practice in a distant state is provable, in most instances there will be simply little or nothing for the home state to gain by prosecuting its own lawyers for an activity that would be entirely unobjectionable if performed within the state. Given the out-of-state location (and, presumably, impact) of the activities, the matter will most often be considered to be largely if not entirely of substantive interest only to the state in which the activity occurred.<sup>119</sup>

Regulatory fixation of local admission as the hook on which to hang lawyer discipline continued, indeed was significantly reinforced, by the rise of local and state bar associations during the last decades of the nineteenth century.<sup>120</sup> That period of a surge of foundings of bar associations is customarily dated with the founding of the first significant American bar association in continuous existence—the

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117. See Wolfram, *Sneaking Around*, *supra* note 47, at 685-86. The matter has, of course, been brought very much to a head by the decision of the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). In *Birbrower*, the court held that New York lawyers who followed directions of long-time New York clients to go to California to assist one of clients' corporate entities in a California-based contract dispute were engaged in unauthorized practice in that state. See *id.* at 7. Therefore, they could not recover unpaid fees from the client that was suing the firm in California for malpractice in allegedly settling the dispute unfavorably. See *id.* *Birbrower* has become a household term in most law offices and occasioned the appointment of an ABA commission to investigate how to deal with the problem of interstate transactional lawyering. See generally COMM'N ON MULTIJURISDICTIONAL PRACTICE, ABA, INTERIM REPORT (2001), available at [http://www.abanet.org/cpr/mjp-final\\_interim\\_report.doc](http://www.abanet.org/cpr/mjp-final_interim_report.doc) (last visited Jan. 22, 2002).

118. See Wolfram, *Sneaking Around*, *supra* note 47, at 686-87.

119. For the way, in general, in which resource-allocation decisions of bar disciplinary officials affects in-state discipline, see *infra* text accompanying note 204.

120. On the history of local and state bar associations, see generally WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.3. See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 561-63 (1973); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 285-88 (1950); HERMAN KOGAN, *THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION 1874-1974*, at 35 (1974).

Association of the Bar of the City of New York in 1870.<sup>121</sup> For the first half-century or so of the ensuing period, bar organizations functioned as private and exclusive organizations. They were set up as nongovernmental, private organizations, and they were, by conscious design, not democratically representative of all segments of the bar.<sup>122</sup> In fact, during the period of bar association founding and the consolidation of their political and social power, their right to exclude some segments of the bar was jealously guarded and rigorously exercised.<sup>123</sup> The accompanying island-mentality of bar-organization leaders made it quite congenial to think of nonmember lawyers as foreigners (sometimes for literally anti-“foreigner” reasons in a nativist or jingoistic sense).<sup>124</sup> For such a mentality, it was sufficient punishment for the bar’s purpose that such unworthy lawyers were outside the club or, when (rarely) found necessary, thrust into that alien void through disbarment or suspension.<sup>125</sup> Bar associations gradually transmogrified into somewhat more democratic, more inclusive, organizations in the latter part of the twentieth century. Discrimination in granting membership correspondingly lessened and then largely ceased.<sup>126</sup> But it did not signal unwillingness to think of excluding lawyers through discipline. The transformation was part of a larger process, which saw the rise of so-called “integrated bars”<sup>127</sup>—or, to use a term that carries less risk of confusion, “mandatory bars”<sup>128</sup>—along with an even more profound transformation of the process through which lawyers were disciplined.

The mandatory bar movement can confidently be traced to North Dakota, whose bar was made mandatory in 1921.<sup>129</sup> The pattern adopted in North Dakota was generally followed elsewhere in the thirty-some

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121. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.3, at 33. The American Bar Association was part of the same flurry of organizational births, being founded shortly thereafter, in 1878. *See id.* § 2.3, at 34.

122. *See id.*; *see also* FRIEDMAN, *supra* note 120, at 563-64; HURST, *supra* note 120, at 288-89. The ABA remains only partly democratic. Many of its institutional structures and its overall membership are hardly consistent with broadly participatory notions. *See* WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.3, at 35.

123. *See* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 123 (1976).

124. *See id.* at 121-29.

125. *See id.* at 128.

126. *See* James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 814 (1997).

127. *See, e.g.*, DAYTON DAVID MCKEAN, *THE INTEGRATED BAR* 21-22 (1963); HURST, *supra* note 120, at 292-93; WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.3, at 36-38.

128. *See* WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.3, at 36-38.

129. *See* 1921 N.D. Laws ch. 25, § 1; MCKEAN, *supra* note 127, at 40-44.

states that eventually accepted the mandatory bar concept.<sup>130</sup> Every lawyer admitted in the state was required to gain and then maintain current membership in the state's bar association as a condition of local admission in good standing.<sup>131</sup> That, of course, could not have been achieved by a private-club bar, which would obviously lack such coercive power even if it had wished to possess it. Instead, the state bar was reconstituted as a quasi-state agency,<sup>132</sup> either by legislation or by direct order of the state's supreme court, and membership in the organization was made mandatory for all lawyers who wished to practice in-state.<sup>133</sup> Even in states that did not adopt the mandatory bar approach, effective centralization of control over the lawyer disciplinary process was achieved, typically through a system of mandatory annual registration with the jurisdiction's highest court,<sup>134</sup> together with formalization of the bar disciplinary mechanisms.

Whether organized as a quasi-state agency or as a private club with a substantial public role, bar associations during this same time moved substantially into the business of regulating lawyers. In the early years of bar associations in the late nineteenth century, their involvement in lawyer discipline had been largely reactive, ad hoc, and episodic. In practice, the involvement was limited to voluntary activity in isolated

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130. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.3, at 37.

131. See 1921 N.D. Laws ch. 25, § 1.

132. On the extent to which the "quasi" is a required term, see WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.4.2, at 42-44, which discusses whether state bars are "state actors" for purposes of the Fourteenth Amendment and federal civil rights statutes. In approving the constitutionality of mandatory state bars, the United States Supreme Court has noted the supportive state's "interest in regulating the legal profession and improving the quality of legal services." *Keller v. State Bar*, 496 U.S. 1, 13-14 (1990).

133. See generally WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.3, at 36-38 (describing mandatory bars). The institution of a mandatory bar has withstood constitutional attack on free association grounds. See, e.g., *Lathrop v. Donohue*, 367 U.S. 820, 845 (1961) (plurality opinion) (indicating that there is no free association right not to be compelled to join mandatory bar as condition of law practice); *Morrow v. State Bar*, 188 F.3d 1174, 1177 (9th Cir. 1999) (applying the *Lathrop* rule), *cert. denied*, 528 U.S. 1156 (2000); cf. *Keller*, 496 U.S. at 16 (stating First Amendment limitations on extent to which mandatory bar can use members' dues for political and ideological activities); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 297-98 (1st Cir. 2000) (reading *Keller* as providing additional ground of attack on mandatory bar activities—one based on claim that activity, here funding of mandatory life insurance group policy, was not germane to organization's purposes). On the role of the inherent-powers doctrine in empowering state supreme courts in many jurisdictions to act with almost plenary and exclusive power with respect to lawyers and their regulation, see *supra* note 54 and accompanying text.

134. On annual registration as a way of recording the names and addresses of all lawyers currently practicing in a jurisdiction and, not at all coincidentally, collecting a levy to support the activities of the bar (particularly the expensive process of bar discipline), see, for example, MODEL DISCIPLINARY RULES, *supra* note 7, R. 8(E), which provides a model rule for adoption by state supreme courts for the registration process.



instances of notorious lawyer misconduct.<sup>135</sup> But, particularly in the last third of the twentieth century, lawyer discipline became more permanent, regulatory, and routinized. That occurred through major structural reforms that occurred at various times over the period. One of those major reforms was that official requirements for lawyer conduct were formalized and made much more explicit through adoption of increasingly regulatory and mandatory lawyer codes.<sup>136</sup> Formalization of the process was attempted initially through adopting whatever existing structure of lawyer discipline that was already in place. That primarily consisted of a widely-shared set of concepts that were as shapeless and formless as the common law itself. For most of the history of the American bar, lawyer discipline has been conducted under an assumption that a minimally-qualified practitioner will be sufficiently advised of what is expected by way of required lawyer behavior from the example and otherwise-expressed preferences of established lawyer colleagues.<sup>137</sup> Only quite recently in that history has any attempt been made to specify in anything approaching exhaustive form the conduct that is required of lawyers. Until 1969, the usual resort<sup>138</sup> was to the

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135. Nineteenth century lawyer discipline operated entirely episodically and without any organizational oversight or stimulus. Most of the reported cases involve lawyers caught *in flagrante delicto*, as the result of the filing of either criminal or civil charges against them—decisions obviously made by prosecuting authorities or private litigants. While the disbarment prosecutions would be pressed by other lawyers, there is no indication that the lawyers represented any formal lawyer organization or were following policies established by such an organization. The prosecution, of course, may have been organized on an ad hoc basis and might well have represented the consensus of the lawyers who regularly rode circuit together with a particular court or who kept up regular social and professional contact of an unorganized kind. Indeed, in Indiana at least it was possible for a private person to include a count seeking disbarment in what was otherwise a civil action against a lawyer seeking damages or another remedy for an alleged wrong. See *Reilly v. Cavanaugh*, 32 Ind. 214, 218 (1869) (holding that lawyer-respondent had right to jury trial in his mixed defense of counts against him seeking disbarment under statute together with civil monetary relief).

136. I engage in shorthand in what follows. It took more than ABA action, of course, to make the lawyer codes official and, ultimately, regulatory. That was accomplished in the great majority of states by persuading the state's highest court (or, rarely—as in Georgia—its legislature) to adopt a version of the ABA model lawyer code as local law. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.6.2, at 55-56.

137. See *id.* § 2.1, at 20.

138. Some states, such as California, for a long time placed heavy reliance on statutory regulations. In California's discipline cases well into the twentieth century, courts relied primarily on the duties of lawyers enumerated in the statutorily prescribed "lawyer's oath." See CAL. BUS. & PROF. CODE § 6067 (West 1990) (providing the current version of lawyer's oath). Over time, California's lawyer discipline has moved toward much greater reliance on court and bar-generated rules, currently the *California Rules of Professional Conduct*. The ABA's 1983 *Model Rules of Professional Conduct* were, in part, based explicitly on provisions of the then-existing California Rules (as was, for example, the title of the ABA Rules). The California Rules, in turn, have more recently been amended to adopt some (but not all) of the changes inaugurated by the ABA's 1983

ABA's 1908 *Canons of Ethics*, which were probably not intended by then bar leaders to be employed for explicitly regulatory purposes<sup>139</sup> and were widely criticized as inadequate for such a purpose.<sup>140</sup> More recently, in 1969<sup>141</sup> and again in 1983,<sup>142</sup> the ABA engaged in a much more self-conscious process of crafting rules for the explicit purpose of imposing norms that could be enforced against lawyers through official discipline.

Other relevant reforms of the process of lawyer discipline during the twentieth century were procedural and administrative. At least at the beginning of the period of increased attention to bar discipline (starting in the 1920s and 1930s), it was not uncommon to find bar associations formally deputized by the state's highest court to prosecute bar disciplinary cases through bar association hearings that were then reviewed in the state's highest court itself.<sup>143</sup> Particularly in jurisdictions in which the prosecuting bar organization remained elitist, the arrangement produced predictable outcries that targets of lawyer

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*Model Rules of Professional Conduct.* See CAL. RULES OF PROF'L CONDUCT (effective May 27, 1989, as amended). With the greater specificity of rules, the California courts no longer acknowledge the lawyer's oath statute as an independent source of discipline offenses, with the exception of its prohibition of a willful violation of a court order. See *Read v. State Bar*, 807 P.2d 1047, 1049 (Cal. 1991). California courts typically show a tendency to keep the ABA's Model Rules and the ABA's interpretation of them at some distance. See, e.g., *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999) (holding that, while California courts may consider provisions of ABA Model Rules as a collateral source for guidance where no direct California authority exists, lawyer cannot be sanctioned for violation of an ABA ethics committee formal opinion, as the Model Rules do not establish obligatory standard in the state).

139. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 2.6.2, at 54. Such an explicitly regulatory role for a moral code generated by a private organization of only a small fraction of the nation's lawyers (in 1908) could not possibly have been imagined by the *Canons'* drafters. On the other hand, they well might have hoped that it would influence the degree of disciplinary effort and perhaps its direction. See *id.* § 2.6.2, at 55 & n.32.

140. See *id.* § 2.6.2, at 54, 56.

141. See MODEL CODE, *supra* note 76, pmb1.

142. See MODEL RULES, *supra* note 72, scope.

143. See Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 476 (2001) (describing early, modest involvement of bar associations in lawyer discipline). In the older pattern, prosecution of bar discipline cases was undertaken by lawyers in private practice on a pro bono basis. Today, in most states, bar discipline cases are prosecuted by full-time and professional disciplinary lawyers. See, e.g., Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II. The Modern Era*, 14 GEO. J. LEGAL ETHICS (forthcoming 2002). Again, the professionalization of disciplinary prosecutors was a key recommendation of the CLARK REPORT, *supra* note 79, at 48-56. See also WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 3.2, at 85. The recent MCKAY REPORT, *supra* note 81, found that almost all states had at least one full-time disciplinary counsel, see *id.* at 96, but that several states still relied heavily on lawyer-volunteers for intake, investigation, or presentation of charges, which the report found inconsistent with the ABA's standards. See *id.* at 96-97.

regulation tended disproportionately to be nonmembers of the bar organization that was inflicting the pain or at least persons, such as solo practitioners, who were not strongly represented in the leadership of the bar.<sup>144</sup>

The searing indictment of then-prevalent bar disciplinary practices by the so-called *Clark Report* of the ABA in 1970,<sup>145</sup> caused a further, and again relevant, transformation of the bar disciplinary apparatus in almost all states. In response to the *Clark Report*, the ABA recommended, and many states adopted, what became the ABA's formally elaborated administrative blueprint for ideal bar regulation.<sup>146</sup> The new system was implemented through a quasi-independent bar disciplinary board, which was constituted to function somewhat independently both of state and local bar associations (including, where relevant, the state's mandatory bar association) and, for different reasons,<sup>147</sup> also independent of the state's supreme court. That new pattern, however, explicitly retained the older regulatory and jurisdictional basis (and limitation) of lawyer discipline—that of local admission.<sup>148</sup> Indeed, that basis was made more explicit in many states by the adoption of the state's lawyer-registration system.<sup>149</sup> Those, in effect, broke off bar regulatory functions from local bar associations by, in effect, reconstituting the idea of a judicial “roll” of lawyers,<sup>150</sup> so that discipline or suspension could take the form of permanent or temporary disenrollment of a lawyer for a disciplinary offense.

None of the disciplinary transformations gave significant reason to challenge the concept of local admission as the jurisdictional basis for lawyer discipline. Only a small minority of states has shown an inclination to break away from the prevailing mindset. An example is Vermont, which on March 9, 1999, published new *Rules of Professional*

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144. See CLARK REPORT, *supra* note 79, at 46-47.

145. See *id.*

146. See MODEL DISCIPLINARY RULES, *supra* note 7, at xi. The 1989 model rules on disciplinary structure and procedures were, in turn, a reworking of the ABA's initial regulatory response to the *Clark Report*. See *id.* The 1989 rules similarly built on standards for selecting disciplinary sanctions adopted in the same year. See *id.*

147. The reason for independence from the bar was to avoid the contamination of bar politics. See WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 3.2, at 82-83. The reason for independence from the judiciary was due process concerns that would otherwise be produced if the same courts that reviewed imposition of bar discipline were intimately involved in prosecuting the cases. See *id.*

148. See *id.* § 2.3, at 36-37.

149. See *id.* § 2.3, at 38.

150. On the process of registration, see *id.*, discussing registration process as fundraising measure, but erroneously implying that registration was limited to nonmandatory bar states.

*Conduct*,<sup>151</sup> some of which departed from the ABA rule, which, of course, the jurisdiction was otherwise following as a model. One of those was Vermont Rule 8.5(b)(2)(iii),<sup>152</sup> which now provides with respect to nonlitigation activities that, if a lawyer “is not licensed to practice in Vermont and engages in the practice of law in Vermont, the rules to be applied shall be the rules of Vermont.”<sup>153</sup> While not clearly written to reach that far, the rule was apparently intended by its drafter to reach conduct such as in-state solicitation of clients by telephone by an out-of-state lawyer.<sup>154</sup>

Vermont is not alone. In California, home to both the *Birbrower*<sup>155</sup> decision and roughly ten percent of the nation’s lawyers<sup>156</sup>—the mandatory lawyer code for several years has stated plainly that it applies both to members of the state bar as well as to others. Rule 1-100(D),<sup>157</sup> entitled “Geographic Scope of Rules,” after stating the local admission rule that “[t]hese rules shall govern the activities of members [of the state bar] in and outside this state,”<sup>158</sup> provides as follows: “As to lawyers from other jurisdictions who are not members: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state . . . .”<sup>159</sup>

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151. See VT. RULES OF PROF’L CONDUCT pmbl. (2000).

152. See *id.* R. 8.5(b)(2)(iii). The rule is somewhat misleadingly titled “Choice of Law.” *Id.* R. 8.5(b).

153. *Id.* R. 8.5(b)(2)(iii). In context, the “rules” being referred to throughout Rule 8.5(b) are the “rules of professional conduct,” as stated in the lead-in line.

154. That indeed is the one example given in the unofficial reporter’s note appended to Vermont’s Rule 8.5: “The provision is intended to reach conduct such as telephone solicitation by out-of-state lawyers that violates the Vermont rules.” *Id.* R. 8.5 reporter’s note. The reporter’s note also indicates that the Vermont rule had no counterpart in either the superseded *Vermont Code of Professional Responsibility* or the ABA *Model Rules of Professional Conduct*. See *id.* The note’s assumption that the disciplinary offense of solicitation is included within the category of activities of a lawyer who “engages in the practice of law in Vermont,” seems somewhat forced as a matter of language, if desirable as a matter of policy.

155. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). For further discussion, see *supra* notes 32, 47 and accompanying text; *infra* note 197 and accompanying text.

156. See State Bar of California, State Bar Overview, at <http://www.calbar.org/2bar/inbrief.htm> (last visited Mar. 25, 2002).

157. See CAL. RULES OF PROF’L CONDUCT R. 1-100(D) (1994).

158. *Id.* R. 1-100(D)(1).

159. *Id.* R. 1-100(D)(2). The rule goes on to state: “but nothing contained in these rules shall be deemed to authorize the performance of such functions by such [nonadmitted] persons in this state except as otherwise permitted by law.” *Id.*

Several additional states have similar regulations,<sup>160</sup> and at least Indiana<sup>161</sup> and West Virginia<sup>162</sup> have claimed the power to pursue discipline against out-of-state lawyers through judicial decision.

That more states have not adopted comparable, and wider, scope to their disciplinary codes is not for lack of explicit bar association support. The ABA has itself formally adopted as policy the position that the hook of local admission should be abandoned in favor of a broader rule. Although not stated in the text of the ABA Model Rules itself, the ABA *Model Rules for Lawyer Disciplinary Enforcement* state in Rule 6(A) that the jurisdiction of the state's supreme court and its disciplinary agency extends both to locally-admitted lawyers "and any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state."<sup>163</sup> That position would be brought into the Model Rules as well if the ABA House of Delegates accepts the

160. See Daly, *supra* note 96, at 749 n.146. In her 1995 article, Professor Daly lists the six following states and quotes relevant language from their rules, which I have brought current:

Alaska: ALASKA RULES OF PROF'L CONDUCT R. 8.5 (1999) ("A person who, although not admitted to practice law in Alaska, is permitted to practice law pursuant to court rule or order [there] is subject to the disciplinary authority [of Alaska] to the same extent as if the person were admitted to practice in Alaska."); Arkansas: ARK. RULES OF PROF'L CONDUCT R. 8.5 (1997) (rule applies to admitted lawyer or a lawyer "practicing in this jurisdiction"); California: CAL. RULES OF PROF'L CONDUCT R. 1-100(D) (1994); Maryland: MD. RULES OF PROF'L CONDUCT R. 8.5(b) (2000)—in Maryland, in addition to locally-admitted lawyers, the rules also apply to:

(b) A lawyer not admitted by the Court of Appeals to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that:

- (1) involves the practice of law in this State by that lawyer, or
- (2) involves the lawyer holding himself or herself out as practicing law in this State, or
- (3) involves the practice of law in this State by another lawyer over whom that lawyer has the obligation of supervision or control.

*Id.*; Michigan: MICH. RULES OF PROF'L CONDUCT R. 8.5 (2001) ("A lawyer who is licensed to practice in another jurisdiction and who is admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction."); North Dakota: N.D. RULES OF PROF'L CONDUCT R. 8.5(b) (2000) (stating that lawyers admitted elsewhere "who actually engage in this jurisdiction in the practice of law" are subject to state's disciplinary jurisdiction).

To Professor Daly's list should be added at least the following: Idaho: IDAHO RULES OF PROF'L CONDUCT R. 8.5 (2000) ("A lawyer admitted to practice in other jurisdictions is subject to the Rules of Professional Conduct as adopted in this state, and may be subject [sic] of appropriate enforcement proceedings in this state, with respect to any practice of law conducted in this state."); New Hampshire: N.H. RULES OF PROF'L CONDUCT R. 8.5(a) (1999) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.").

161. See *supra* note 49.

162. See *supra* notes 44, 49 and accompanying text.

163. MODEL DISCIPLINARY RULES, *supra* note 7, R. 6(A).

recommendation of its Ethics 2000 Commission. It recommends amending Model Rule 8.5(a) to expand the disciplinary authority of a state adopting the amendment by adding the following language: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction . . . ." <sup>164</sup>

The procedural means by which a state can acquire personal jurisdiction over an out-of-state lawyer for the purposes of professional discipline are ready to hand. In fact, in some instances of discipline of in-state lawyers, in-hand service of process is not possible because of the lawyer's flight or other departure from the state. Most states provide, either as an alternative to in-hand service of process or as a method that may be employed in the first instance, that service by mail suffices. <sup>165</sup> The usual games that might be played with service are made unavailing, for example by a rule that service by certified mail is effective even if the lawyer-recipient attempts to defeat it by refusing to accept and sign the certification. <sup>166</sup> Many states have followed the recommendation of

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164. REPORT WITH RECOMMENDATION, *supra* note 6, at 274 (proposed Model Rule 8.5(a)). The unofficial reporter's explanation of changes notes that the amendment "is an appropriate rule to adopt in the [ABA Model Rules of Professional Conduct], given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct." *Id.* at 277 (R. 8.5 & Reporter's Explanation of Changes):

There are a number of ways in which discipline might be implemented, including making a disciplinary record and sending it to states in which the lawyer is admitted and having those jurisdictions impose reciprocal discipline. (Alternatively, if disciplinary authorities are ever given a broader range of sanctions, e.g., fines, fee forfeiture or an award of damages, the disciplining jurisdiction could act on the lawyer directly.)

*Id.*

165. *See, e.g., In re Smith*, 794 P.2d 601, 603 (Ariz. 1990) (in banc) (approving use of substituted service under civil rules on lawyer incarcerated in out-of-state federal prison).

166. *See, e.g., Baca v. State Bar*, 801 P.2d 412, 416 (Cal. 1990) (in bank). In *Baca*, the California Supreme Court held that service of notice of disciplinary charges by certified mail was effective despite a lawyer's failure, through three written notices from the postal service, to retrieve certified mail awaiting his signature. *See id.* The court stated that "Baca cannot defeat service by refusing to accept his mail, and he cannot now come before this court and argue that his own dereliction caused the notice to be defective." *Id.* The ultimate game—ignoring service of process—is, of course, as unavailing for lawyer defendants in bar discipline proceedings as it is for defendants generally. Default will occur. *See, e.g., In re Chew*, 448 S.E.2d 443, 444 (Ga. 1994) (per curiam) (holding that lawyer who, on receipt of disciplinary complaint in envelope, simply placed unopened envelope in desk defaulted and was therefore ordered disbarred on pleaded charges); *Harrison v. Miss. Bar*, 637 So. 2d 204, 215 (Miss. 1994) (en banc) (holding that incorporation of civil rules into bar disciplinary proceedings results in default on the part of lawyer who took no action after being effectively served with disciplinary complaint). Moreover, willful disregard of a served complaint of disciplinary charges has been treated as an aggravating factor in imposing discipline. *See, e.g., Middleton v. State Bar*, 796 P.2d 1326, 1334 (Cal. 1990) (in bank) (holding that lawyer's willful failure to keep bar informed of current address, as required, does not invalidate service of

the ABA's *Model Rules for Lawyer Disciplinary Enforcement* and provided for service by registered or certified mail as an alternative to in-hand service.<sup>167</sup> Moreover, many states have also followed the recommendation to incorporate the state's civil rules by reference,<sup>168</sup> providing an independent basis for invoking the state's long-arm statute when needed. The only barrier to sensible enforcement against out-of-state lawyers is continued insistence on the supremacy of the local admission rule. The foregoing establishes that it is unnecessary. As will next be discussed, the rule is also a bad idea.

#### VI. REASONS WHY THE LOCAL ADMISSION RULE IS BAD STATE POLICY

The admission-only basis for bar discipline leaves states open to activity by out-of-state lawyers that should be, but is not, subject to local disciplinary regulation. The potential undesirable effects of such uneven regulation are several. First, other potentially available remedies do not adequately and in all important instances vindicate the state's interest in regulating lawyer activity that has undesirable in-state effects—on clients, third parties, and the system of justice. Second, out-of-state lawyers are treated with, in effect, greater solicitude that in some circumstances can place them at an unfair competitive advantage with respect to regulated in-state lawyers. Third, there are distinctive procedural advantages that could be gained from local regulation of out-of-state lawyers. Fourth, because of the continuance of the local admission mindset, states may continue to be misled into otherwise extravagant notions, such as the belief expressed in some opinions that the absence of regulatory power over nonadmitted lawyers justified a stringent test of unauthorized practice as applied to such lawyers in order to preclude them from practicing within the state. Such a statement is extravagant because, as analyzed in this Article, states *do* have the power to regulate out-of-state lawyering with a local impact.<sup>169</sup> The failure of a state to implement that power is entirely a self-inflicted

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disciplinary papers and, together with other circumstances, constitutes basis for enhanced sanctions for lack of cooperation with proceeding).

167. See MODEL DISCIPLINARY RULES, *supra* note 7, R. 13(A) (providing for personal service of statement of charges or by registered or certified mail to address shown on agency's current registry).

168. See *id.* R. 18(B) (generally incorporating a state's civil procedure rules except where inconsistent with explicit rule).

169. See *supra* notes 15-22 and accompanying text.

limitation. As such, it hardly supports an argument for Draconian restrictions on transitory lawyers based on necessity.

A. *The Inadequacy of Nondisciplinary Remedies*

Demonstrating that the local admission rule might lead to undesirable effects does not, by itself suffice, for it could be urged that, aside from the process of bar discipline, out-of-state lawyers remain subject to a significant range of other procedural remedies, and that, in view of the (imagined) plentitude of such remedies, the case for state disciplinary jurisdiction over nonadmitted lawyers cannot be made. While portions of such an argument are unassailable (for example, that other remedies at least theoretically exist), its implicit claim that other available, nondisciplinary remedies suffice to vindicate all important state policies is, in my view, incorrect.

To be sure, for many wrongs described in a state's lawyer code or otherwise sought to be proscribed, remedies other than lawyer discipline are available. For example, and as discussed in more detail above,<sup>170</sup> in the factual scenario assumed to exist in the *Allen* decision, in-person solicitation within a state constitutes a misdemeanor offense punishable by criminal prosecution.<sup>171</sup> Legally cognizable injury that the nonadmitted lawyer might inflict on a person within the state, such as financial harm caused by false statements made by the lawyer in the course of the solicitation, could be remedied through a civil action by that person, and courts of the state would be available because of the effective reach of the state's long-arm statute.<sup>172</sup> Moreover, if one's concern is with threatened future repetitions of the wrongful activity, states are clearly empowered to entertain a suit against the out-of-state lawyer to enjoin such,<sup>173</sup> again, basing personal jurisdiction over the out-of-state lawyers on the state's long-arm statute.

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170. See *supra* notes 15-31 and accompanying text.

171. See *supra* note 16 and accompanying text.

172. See *supra* note 36 and accompanying text.

173. For example, the Supreme Court of Florida in December 1999 considered a proposal of the state's bar to extend the state's advertising and solicitation rules to all lawyers (and not just Florida lawyers) who advertise or solicit in the state. See *In re Amendments to Rules Regulating the Fla. Bar—Adver. Rules*, 762 So. 2d 392, 393 (Fla. 1999) (per curiam). The proposal was stimulated by an asserted influx of out-of-state lawyers to solicit the families of victims of a Florida Everglades air crash. See *id.* The Florida court rejected the proposal, apparently on the belief that existing remedies sufficed: "Our case law is clear that improper solicitation or advertising in Florida by lawyers admitted in other jurisdictions is prohibited as the unlicensed practice of law[.]" and thus would presumably be subject to injunction in Florida, and "such lawyers remain subject to the disciplinary authority of the jurisdictions in which they have been admitted." *Id.* at 394-95.



But, even if such remedies are theoretically available, there remain significant reasons for concern that they might not serve all legitimate and important state interests. Again, take the instance of in-state solicitation. The presumed availability of response through a criminal prosecution is probably ill-founded, for the reasons already discussed.<sup>174</sup> Prosecutors simply have larger fish to fry and insufficient resources to squander them in misdemeanor prosecutions against out-of-state defendants—particularly predictably litigious lawyer-defendants. An action for an injunction against future violations,<sup>175</sup> while supportable on a broad base of personal jurisdiction, must be brought by a self-selected plaintiff (if, for example, brought by an individual lawyer admitted in the state or a bar association of such lawyers) or by a state prosecutor. No such individual is any longer entrusted with the formulation and application of the state's policy on matters of lawyer discipline, and there is insufficient reason to believe that all such prosecutions (with their ample opportunities for plea bargaining and settlement arrangements) will closely and carefully follow the state's bar policy regarding the charged offense.<sup>176</sup> Such an action could, of course, be brought by bar disciplinary authorities, but then would be filed in an unfamiliar tribunal.

Further, while the possibility exists that the lawyer's unlawful activities in West Virginia may be the subject of bar disciplinary proceedings in any other jurisdiction in which the lawyer is admitted to practice, there is ample room for doubt that such a theoretical possibility will come to pass in many instances. In the situation described in the *Allen* decision, it would be open for the District of Columbia bar authorities to initiate a home state disciplinary proceeding, as discussed above.<sup>177</sup> In fact, however, bar disciplinary authorities in almost all states

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174. See *supra* notes 38-43 and accompanying text.

175. See *supra* note 34 and accompanying text.

176. Different, of course, would be the imposition of contempt sanctions as a remedy in the specific context of a professional disciplinary proceeding itself. While rare, such sanctions are occasionally encountered and seem consistent with the customary notion that the disciplinary proceeding is held pursuant to otherwise-applicable rules of civil procedure. See, e.g., *In re Cook*, 526 N.E.2d 703, 706 (Ind. 1988) (per curiam) (holding that hearing officer had power to hold respondent lawyer in contempt, with \$300 fine as sanction, for flagrant tardiness in attending a scheduled hearing).

177. See *supra* note 97 and accompanying text. For a recent, arguable instance of a counterexample, see *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001), where a lawyer, admitted in both D.C. and Virginia, was disciplined in D.C. for moving to withdraw in a Virginia proceeding and revealing clients' secrets in violation of the Virginia lawyer code. See *id.* at 1032. In such instances, it well might be that the bar disciplinary officials of the two potentially interested jurisdictions confer and decide which of the two should proceed, with the other jurisdiction being available for the imposition of reciprocal discipline, if any.

operate with limited personnel, a limited budget, and resistance from bar leaders, lawyer volunteers who in most jurisdictions continue to provide much of the staffing, and lawyers and other professionals who must serve on hearing boards. As a result, bar disciplinary professionals operate on somewhat of a triage basis: using their limited enforcement resources primarily (if not exclusively) to remedy lawyer conduct with serious, or at least notorious, local effects. While a District of Columbia disciplinary counsel whose attention was drawn to the facts might conclude that the facts of the *Allen* decision might warrant discipline in an ideal system, in a world of limited resources, she well might conclude that funds and personnel are better employed for antisocial activities of lawyers who are either accused of local wrongdoing or where proof of wrongdoing elsewhere has already been substantially established—either through a criminal conviction, which can be locally proved quite efficiently through the judgment of the nonlocal court, or through professional discipline elsewhere, which can again be proved efficiently through the cooperative process of interstate reciprocal discipline.<sup>178</sup>

Indeed, it has been argued that this reluctance to prosecute is so generalized that bar disciplinary agencies would refuse to implement expanded powers to discipline out-of-state lawyers for in-state conduct.<sup>179</sup> The concern about underutilized disciplinary power is, however, surely overstated. What is true is that agencies must, and do, make reasonable decisions about offenses to prosecute and those not to pursue, with the hope that offenses left unprosecuted will nonetheless be subject to other consequences. And it follows that disciplinary agencies will reasonably decide not to devote resources to some, perhaps many, instances of wrongdoing committed in the jurisdiction by out-of-state lawyers. But it hardly follows that *no* prosecution will ever prove of local interest. As I will argue later, bar discipline should be reserved for just such misconduct, but it certainly should be possible to assert disciplinary power in those very cases.

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178. See *supra* notes 80-87 and accompanying text.

179. See, e.g., *Ethics 2000 Panel's Proposals Won't Reach Floor Debate Anytime Soon, Member Predicts*, 16 *Laws. Man. on Prof. Conduct (ABA/BNA)* 278, 278 (June 7, 2000) (reporting comment by bar disciplinary official at open hearing by ABA's Ethics 2000 Commission questioning whether "as a practical matter will disciplinary counsel be willing to commit the resources necessary to pursue nonadmitted lawyers and to achieve enforcement of their state's discipline order in the lawyer's home state?").

*B. The Salience of Local Disciplinary Policy*

Another, and more fundamental reason why the local admission rule is bad policy is broadly suggested by asking the radical question: why not abolish professional discipline entirely—for *all* lawyers—and rely instead upon other remedies to enforce the objectives of the lawyer codes?<sup>180</sup> Answering that question is certainly germane to the present inquiry, for a state that fails to regulate nonadmitted lawyers through the process of professional discipline, in effect, proceeds on the implicit assumption that nondisciplinary remedies suffice or that in-state acts by nonadmitted lawyers are categorically not a matter of sufficient importance to warrant regulation. Critics of the system of bar discipline abound, but none has been so radical as to suggest eliminating the system entirely. Were the radical question raised of the base justification for the separate system of lawyer discipline, certainly the organized bar would oppose it. For the organized bar and the courts, professional discipline provides unique and important social and institutional benefits that cannot be duplicated by other possible sanctions—benefits so important as to require maintenance of the system of lawyer discipline.

The importance of bar discipline can be explained in both substantive and procedural terms. Substantively, the lawyer codes embody a set of policies that are unique to lawyers and that are sometimes unique to the jurisdiction. Those codes attempt to balance assumptions and understandings about how the work of the profession should be carried on, and the codes do so against the background of both existing state law and such fundamental professional policies as the right to the effective assistance of counsel and the centrality of client loyalty. The resulting matrix of regulation reflects what is unique to each state in the necessary process of balancing lawyer claims for such matters as the preeminence of client objectives against broader social interests, such as protecting innocent persons (including both clients and others) from harm. Lawyers also work constantly with public institutions, and their misconduct in the course of that work can impose dramatic and deleterious impacts upon them. To take only the most obvious example, courts are vulnerable institutions if unprotected by bar discipline (among other remedial systems) against fraudulent or overly-aggressive lawyers. The same is true, of course, of other public institutions such as administrative tribunals and agencies.

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180. In more radical form, the question can be directed to the lawyer codes themselves, asking why they should not be repealed and antisocial lawyer behavior left to regulation by the law of torts and contracts, along with the criminal law.

Nor should it be supposed, as overconcentration on national “models” for lawyer codes tend to do, that the lawyer codes in fact applied in each of the states reflect national uniformity of approach. The contrary has been illustrated in every significant attempt in recent decades to formulate national standards for the legal profession and in the process of attempting to achieve state-by-state adoption and revision of lawyer codes. The substantive standards for lawyer conduct have intensely local dimensions. Each state has sometimes insisted on significant variations in their local lawyer codes as compared with national “models.”<sup>181</sup> All of that strongly implies the importance of local bar disciplinary policy.

Closely tied to the substantive objectives sought to be achieved by the individualized state lawyer codes is the process of lawyer discipline. That system, now adjudicated in part before members of the public (through nonlawyer membership on bar disciplinary bodies in most jurisdictions) but also with strong representation from among other lawyers, seeks to bring to questions of proper lawyer conduct a combination of local community values together with the knowledge, traditions, and aspirations of law practice. Appellate review by lawyer-judges of at least all serious allegations of lawyer misconduct also suggests the importance of the jurisdiction’s lawyer disciplinary system for vindicating important legal professional objectives.

All of those uniquely local values of lawyer regulation are set at naught due to the local admission requirement, which denies to the state all effective regulatory power over nonlocal lawyers. I next consider another not-inconsequential, but hardly as devastating, consequence of that imbalance—the imbalance in treatment in imposing discipline between local and nonadmitted lawyers.

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181. The reality of disuniformity was driven home to my Cornell colleague Roger C. Cramton and me some years ago when searching for a way to avoid paying the ABA the high royalty cost of placing a copy of the ABA *Model Rules of Professional Conduct* on Cornell’s free access Legal Information Institute website (on what is now known as LII’s American Legal Ethics Library, <http://www.law.cornell.edu> (last visited Apr. 22, 2002) which now contains links to the codes of every American jurisdiction). We spent many hours searching for the jurisdiction whose adoption of the ABA’s model was, hopefully for the purpose, slavishly close. To the general credit of the states involved, we found that only one state came close. That close copy was the *Idaho Rules of Professional Conduct*. (Idaho’s bar was quite willing to grant copyright permission gratis for the purpose.) Even there, the state had significantly departed from the ABA model in its advertising rules.

*C. Equal Disciplinary Treatment of Local and Nonlocal Practitioners*

Although the point should not be overstated, the potential exists under the local admission rule for serious differences in the extent to which locally admitted lawyers are subject to the regulatory policies of each state as compared to nonadmitted lawyers. While the present state of lawyer multijurisdictional practice has not yet brought to light any instance in which an out-of-state lawyer has advertised her greater freedom from local regulation in order to be better able to attract local clients, situations such as that presented in the *Allen* decision do strongly suggest that out-of-state lawyers who are not subject to local regulation may attempt to take advantage of their relatively greater immunity from effective local regulation to take risks with the limits of those regulations that a local practitioner, if known to be more likely vulnerable to local regulation, would not take. The resulting state of affairs breeds opportunities for out-of-state lawyers to push the regulatory envelope and beyond, with consequent enhancement of the risk that locally required protections for clients, third parties, and public institutions will suffer in the process. Moreover, the threat of such immunized competitors may occur to in-state lawyers as cause for competition-in-kind. On the facts of the *Allen* decision, local lawyers may be motivated to solicit unlawfully so as not to lose potential local clients to out-of-state lawyers who might, due to the local admission rule, feel more willing to do so. Nonenforcement against out-of-state lawyers would induce some tendency at least for a race to the bottom in solicitation practices.

*D. The Question of Efficacy of Discipline in a Nonadmission State*

A possible objection to any thesis that discipline should be expanded into states in which a lawyer is not admitted is that doing so would be otiose. The objection would be based on the observation that—as a matter of definition—a nonadmitted lawyer cannot be subjected to disbarment or suspension. Such an objection, which is sometimes heard in discussions of this topic, takes too narrow a view of the range of available disciplinary remedies and their collateral consequences under the concept of reciprocal discipline. Under that concept, a finding in a disciplinary proceeding in State A that a lawyer violated a lawyer code provision will be given presumptive recognition in every other state in

which the lawyer is admitted.<sup>182</sup> It is true that the most familiar bar disciplinary remedies by far are disbarment and suspension. It is also true that those familiar remedies are either meaningless or should properly be considered beyond the power of State A with respect to a lawyer who has been admitted to practice only in State B. They are meaningless within State A, because the lawyer implicitly claims no local license, but in effect takes a defiant stance with respect to the legal requirements of State A. Disbarment and suspension are beyond the power of State A, since it would be unconstitutional for a court in State A

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182. The typically limited effect given to a sister-state finding of a lawyer code violation is significantly different from the interstate operation of collateral estoppel. Under the latter doctrine, findings that are the product of actual litigation and that are necessary to a judgment cannot be relitigated. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (setting out general rule of collateral estoppel (called issue preclusion in the *Restatement*)). Moreover, judgments of State A will be given collateral estoppel effect in State B. The contemporary interstate effect of disciplinary findings under the doctrine of reciprocal discipline is quite different. The rules on reciprocal discipline give only presumptive, or prima facie finality to disciplinary findings of sister-states. *See* WOLFRAM, MODERN LEGAL ETHICS, *supra* note 18, § 3.4.6, at 116. An older view, that states were required to accept sister-state disciplinary findings without question under the Full Faith and Credit Clause, *see id.* at 116 n.84, seems no longer to be followed.

Unlike the operation of collateral estoppel, the very dominant position in reciprocal discipline cases is to accept a finding of the other state as presumptively correct unless the lawyer can demonstrate some serious defect giving a substantial basis for refusing to accept the finding. *See id.* (describing states' general acceptance of findings of other states, unless shown to be seriously defective); *see also* *People v. Mattox*, 862 P.2d 276, 277 n.2 (Colo. 1993) (per curiam) (quoting state bar rule providing for accepting findings of other states unless proceedings were lacking in due process or lawyer establishes basis for "clear conviction" that finding suffered from infirmity of proof); *In re Lichtenberg*, 871 P.2d 981, 982 (N.M. 1994) (per curiam) (same); *In re Erickson*, 510 N.W.2d 127, 127-28 (Wis. 1994) (per curiam) (holding that decision of Missouri Supreme Court in subsequent and unrelated case that rule of evidence applied against lawyer in earlier disciplinary proceeding was erroneous and created an "infirmity of proof" in disbarment proceedings, precluding giving preclusive effect to its findings). That procedure follows the recommendations of the ABA in its MODEL DISCIPLINARY RULES, *supra* note 7, R. 22(D), which provides a model reciprocal discipline standard for accepting fact findings. It is also consistent with the approach taken by the United States Supreme Court in determining whether a federal court should accept a finding of a state court that a lawyer has committed disciplinary misconduct. *See* *Theard v. United States*, 354 U.S. 278, 281 (1957). *But cf. In re Cook*, 49 F.3d 263, 266 (7th Cir. 1995) (dubiously reading *Theard* to support dicta that state disciplinary authorities could not relitigate finding of federal court that lawyer had committed contempt). The opportunity for a lawyer to demonstrate such infirmity has been held required by due process. *See* *State ex rel. Neb. State Bar Ass'n v. Dineen*, 455 N.W.2d 178, 180 (Neb. 1990).

Not all decisions apparently follow the ABA's recommended approach. Some states appear to apply rules more akin to settled collateral estoppel doctrine. *See, e.g., Fla. Bar v. Friedman*, 646 So. 2d 188, 190 (Fla. 1994) (per curiam) (finding that, in view of state bar rule that other-jurisdiction finding is considered "conclusive proof" of misconduct, lawyer could not contest New York finding even though it was based on a lesser proof standard (preponderance of evidence) than Florida requires (clear and convincing evidence)); *Miss. Bar v. Strauss*, 601 So. 2d 840, 844 (Miss. 1992) (en banc) (stating that Mississippi would follow similar approach, the only open issue is the type of sanction).

to purport to affect so directly a solemn decision of the supreme court of State *B* to admit the lawyer in question to practice.<sup>183</sup> But, total fixation on the remedies of disbarment and suspension would be too limited, for two reasons.

First, one must not lose sight of the much more extensive arsenal of remedies available to contemporary bar disciplinary agencies quite beyond stripping away the privilege of local admission through disbarment and suspension. While some states have not empowered their bar disciplinary agencies to impose all such sanctions, in several states, court decisions or regulations authorize such other disciplinary penalties<sup>184</sup> as fines,<sup>185</sup> reprimands,<sup>186</sup> probation,<sup>187</sup> or injunction orders.<sup>188</sup> Any objection that those other remedies are readily evaded by a nonadmitted lawyer, of course, ignores the federal constitutional requirement that, to the extent the latter proceeding does not involve

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183. I am aware of no such attempt, but should one be attempted, it is not at all clear that such would be consistent with a notion of comity between the states that might be found by the United States Supreme Court to have constitutional dimensions.

184. On the general range of nonsuspension disciplinary remedies, see generally WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 18, § 3.5.6, at 135-38, which discusses restitutionary orders in bar discipline proceedings, and *id.* § 3.5.7, at 139-41, considering other sanctions, such as conservatorship, probation, supervised practice, retraining, costs, sanctions, and fines.

185. See, e.g., *In re Stuhff*, 837 P.2d 853, 857-58 (Nev. 1992) (per curiam) (holding that lawyer who personally served a disciplinary complaint on a judge trying a criminal case of a client should be fined \$5000 and reprimanded, rather than suspended for six months as recommended by disciplinary board); cf. *In re Huckaby*, 694 So. 2d 906, 907 (La. 1997) (per curiam) (ordering lawyer, as condition to probation, to pay all past-due taxes, interest and fines assessed by taxing authorities). The ABA *Model Disciplinary Rules* do not list fines as an available sanction. See *MODEL DISCIPLINARY RULES*, *supra* note 7, R. 10(A) (listing only disbarment, suspension, probation, reprimand, administrative admonition, restitution, and costs as available sanctions). Some courts refuse to acknowledge the legitimacy of fines as a disciplinary sanction. See, e.g., *Fla. Bar v. Frederick*, 756 So. 2d 79, 89 (Fla. 2000) (per curiam) (holding that disciplinary board has no authority to impose sanction of fines).

186. See, e.g., *State ex rel. Okla. Bar Ass'n v. Patterson*, 28 P.3d 551, 560 (Okla. 2001) (per curiam) (ordering "public censure" as reciprocal-discipline sanction for offenses of misconduct in federal court litigation and failing to report federal court sanctions to state disciplinary office). See generally *MODEL DISCIPLINARY RULES*, *supra* note 7, R. 10(A)(4) (imposing a written reprimand by court or disciplinary board, in either event to be published).

187. See, e.g., *In re Smith*, 625 So. 2d 476, 477 (La. 1993) (per curiam) (imposing one-year suspension followed by one-year probation during which lawyer was required to hire a certified public accountant to conduct quarterly audits of trust account); *Comm. on Legal Ethics v. Morton*, 410 S.E.2d 279, 282 (W. Va. 1991) (per curiam) (holding that failure to communicate properly with clients required period of probation with supervision through mentoring program). See generally *MODEL DISCIPLINARY RULES*, *supra* note 7, R. 10(A)(3) (describing the sanction of probation).

188. An injunction issued by the Indiana Supreme Court against an out-of-state lawyer enjoined the lawyer from any future violation of Indiana's lawyer code. See *supra* note 49. In each instance, the offense hardly extended to the entire lawyer code. In effect, the court was adopting an extremely broad-based kind of injunctive relief sometimes found in orders of administrative agencies in enforcement actions.

lawyer discipline, all other states give full faith and credit to the judicial decrees of every other state.<sup>189</sup> In the instance of possible lawyer-disciplinary proceedings in other states, it ignores the now well established operation of the notion of reciprocal discipline.<sup>190</sup> Thus, at the level of the power of a nonadmitting state to impose professional discipline, some entirely meaningful sanctions are readily available, so long as they have been provided for by local rule or decision.

Second, even an apparently mild remedy such as a reprimand can have quite serious collateral consequences—including consequences in a local admission state. Moreover, those consequences can be much more severe than the sanction that can be imposed in the jurisdiction first adjudicating the offense. Take, for example, the situation confronting the West Virginia Supreme Court in the *Allen*<sup>191</sup> decision—out-of-state lawyers soliciting West Virginia clients. While a reprimand administered to such a lawyer will be, presumably, a significantly less arduous—and thus, in some sense, an arguably overly lenient—remedy than might be imposed on a soliciting lawyer admitted locally, the story would most likely not end there. To follow the specific facts of that decision, back home in the District of Columbia, a lawyer so disciplined would find that bar regulators in the District operate under an active system of reciprocal discipline.<sup>192</sup> Under that notion, the District's own bar disciplinary body will give presumptive effect to the findings of fact of West Virginia.<sup>193</sup> Among other considerations, that effect makes the prosecution more attractive to a busy District bar counsel, because it avoids the expense and inconvenience of proving an offense that occurred at a distance. In the District, moreover, local remedies will include those of disbarment and suspension which are not available in the jurisdiction in which the lawyer was not admitted.<sup>194</sup> Such a more drastic sanction might be warranted, for example, because of the lawyer's prior disciplinary offenses<sup>195</sup> or because of the aggravated nature of the offense.<sup>196</sup>

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189. See U.S. CONST. art. IV, § 1. Again, one must note that the rules of reciprocal discipline are more relaxed than the rules of collateral estoppel. See generally *supra* note 182.

190. See *supra* notes 80-87 and accompanying text.

191. *Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317 (W. Va. 1996). For further discussion of *Allen*, see *supra* notes 16-24 and accompanying text.

192. See *supra* notes 80-87 and accompanying text.

193. See *supra* note 182.

194. See *Allen*, 479 S.E.2d at 336.

195. On prior disciplinary offenses as an aggravating factor, see ABA STANDARDS FOR SANCTIONS, *supra* note 64, R. 9.22(a), which lists "prior disciplinary offenses" as one of several factors that may justify an increase in the severity of sanctions otherwise appropriate. Note that the



In summary, to my mind the case for local disciplinary regulation of certain activities of nonadmitted, out-of-state lawyers is compelling. But that does not lead to a reversal of doctrine as radical as, for example, the logically possible proposition that each state should be empowered to impose professional discipline on all lawyers, wherever admitted to practice and no matter how ephemeral their contact with the state and how inconsequential the effects of that contact. One may well object that this discussion is needless, as no state has proposed to regulate all out-of-state lawyers. I wish that could confidently be agreed to, but there are intimations in decisions such as *Birbrower* of a truly extravagant substantive reach of a state's power to apply its concepts of correct lawyering to nonadmitted lawyers. I refer to the portion of the California Supreme Court's opinion in which, admittedly with indirection and ambiguity, the majority makes the alarming suggestion that a New York lawyer sitting at her desk in New York and advising a New York resident (who was an officer of a California-incorporated entity) about a point of California law would be subject to the unauthorized practice (and perhaps other) laws of California.<sup>197</sup> With no connections to California other than those, it is unclear whether the United States Supreme Court (were it to hear the case) would uphold a decision of California to apply its own law to the New York-based activities of the

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ABA Standards refer to offenses without regard to whether the offense had previously been found in a disciplinary proceeding.

196. The ABA Standards for Sanctions list in rule 9 a number of aggravating factors based on the nature of the offense: dishonest or selfish motive; a pattern of misconduct; multiple offenses; and vulnerability of the victim. *See id.* R. 9.22.

A bar rule in the District of Columbia provides that in a reciprocal discipline proceeding, the court will apply a rebuttable presumption that discipline will be the same as was imposed in the originating jurisdiction. *See, e.g., In re Fuller*, 674 A.2d 907, 909 (D.C. 1996) (per curiam) (holding that, while D.C. would ordinarily impose longer period of suspension for same offense, court would follow Illinois period of suspension where within range of what D.C. might impose in same types of cases, without regard to specific aggravating factors here). That rule seems to rest on a background assumption that the other jurisdiction would have had an opportunity to apply any one of the customary range of disciplinary sanctions. Such a rule would, of course, be inappropriate in the special instance of discipline imposed by a nonadmission jurisdiction.

197. *See Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), stating that, in determining whether a lawyer practiced "in California":

The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor . . . but it is by no means exclusive. For example, one may practice law in the state . . . by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.

*Id.* at 5-6.

New York lawyer. In a sensible world, no such issue would ever be presented. Beyond the possible compulsion of federal constitutional law, as a matter of sound local policy, local resources devoted to lawyer discipline should be deployed only when there is a reasonable likelihood of achieving a significant and justifiable objective of local policy. That would seem to require further articulation of state interests other than some arguable but entirely tenuous connection to the state.

At an extreme opposite end of state policy concern, several of the few articulated state rules in jurisdictions that do permit local disciplinary agencies to deal with state lawyers contain arguable limitations that seem both unintended and unwise. Those too require address. I turn to both sets of issues in the Article's final portion, which attempts to formulate a standard that empowers the state's disciplinary authorities to subject to local disciplinary scrutiny all instances, but only such instances in which such an exercise of extraterritorial power seems wise.

## VII. SENSIBLE LIMITATIONS ON DISCIPLINARY JURISDICTION

### A. *Federal Constitutional Limitations on Extraterritorial Regulation of Lawyers*

An inherent and natural consequence of the American federal system of government is that the extraterritorial power of each state must be subject to significant constraint.<sup>198</sup> Failure to recognize some such limiting rule would produce the chaotic, burdensome and unfair spectacle of states attempting to export to other states their own conception of appropriate policy or other outcome, imposing that policy or outcome on persons and institutions that had no connection with the proclaiming state. Such unlimited rulemaking would quite predictably produce conflicts of policies and norms.<sup>199</sup> Such a regime would be unfair in several respects. Citizens in distant states with an appropriately law-abiding bent of mind could hardly hope to cope with the confusing array of local and nonlocal state laws, all contending for application on a national (if not international<sup>200</sup>) basis. The out-of-state reach of a state's

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198. See Kreimer, *supra* note 9, at 519.

199. Theoretically, one could attempt to resolve the resulting bedlam by imposing a constitutionally mandated choice-of-law system for resolving such conflicts. The solution under the Due Process and Commerce Clauses has been, if less elegant, more straightforward.

200. On the special problem of state laws that may interfere with the exclusive control of the federal government over foreign policy, see, for example, *Zschernig v. Miller*, 389 U.S. 429 (1968),

law would hardly comport with democratic theory, under which there is at least rough reciprocity between the power of a state to regulate and the power and right of citizens of the state to affect the shape of regulation (and the political careers of elected regulators) through exercise of the power of the ballot box.<sup>201</sup> Moreover, the specter of citizens of one state being haled into the distant courts of another state without any legitimizing basis for imposition of such a burden would be fundamentally unfair.

Those and similar considerations have been worked out as a matter of federal constitutional law in two bodies of limitations on the territorial reach of the governmental powers of states. One body of law concerns the substantive power of a state to regulate persons and activities outside the state. Chief among these are Supreme Court cases dealing with the power of a state to impose taxes on nonresidents of the state.<sup>202</sup> Another body of law, already touched upon in the case of lawyer respondents, concerns due process limitations on the exercise by state courts of jurisdiction.<sup>203</sup> For present purposes, the command of each can be captured by concepts from personal jurisdiction requiring that (1) the respondent lawyer must have purposefully availed herself of the privilege of conducting activities within the state asserting regulatory jurisdiction, and (2) that, considering all the circumstances, the burden of defending the disciplinary proceeding would not be unfair. Where, precisely, those lines should be drawn is, for reasons next to be explored, not a matter that should concern a state in establishing policy about such jurisdiction. For, as next discussed, the line of policy should be drawn well short of the outermost limits to which the Federal Constitution would permit a state to reach.

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where the Court held unconstitutional an Oregon statute on the ground that it limited situations in which a nonresident alien could take property from an in-state decedent. *See id.* at 440-41. Also prohibited are state laws that discriminate against aliens as an insular minority. *See, e.g., Oyama v. California*, 332 U.S. 633, 647 (1948) (holding unconstitutional as impermissibly discriminatory under Fourteenth Amendment Equal Protection Clause state law limiting in-state land ownership on grounds of race or national origin of person providing funds for purchase).

201. *See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW* 1062-1153 (2d ed. 1988).

202. *Compare Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 315 (1998) (holding unconstitutional on privileges and immunities grounds a New York statute that effectively denied only nonresident taxpayers income tax deduction for alimony payments), *with Scripto, Inc. v. Carson*, 362 U.S. 207, 212-13 (1960) (holding that Florida's requirement that out-of-state manufacturer collect and pay use tax on sale solicited in state by independent parties did not offend either the Interstate Commerce Clause or the Due Process Clause of Fourteenth Amendment).

203. *See, e.g., CLERMONT, supra* note 36, at 21-24 (noting that "from outside the states, the Constitution and its Due Process Clause of the Fourteenth Amendment limit how far they can reach").

*B. Prudential Limitations on Lawyer-Disciplinary Jurisdiction*

As already discussed, there are weighty practical reasons why a state that wishes its bar disciplinary machinery to energize itself to deal with an in-state offense by an out-of-state lawyer should recognize that the machinery is inherently and necessarily in short supply and should not be employed in envelope-pushing attempts to obtain jurisdiction over out-of-state lawyers.<sup>204</sup> A separate consideration points very strongly in the same direction of restraint, and it would even apply in a world of unlimited disciplinary resources. As has been uniformly recognized, even in otherwise-restrictive decisions, it is often highly useful, if not indispensable for a lawyer admitted only in State A to be able to be physically present in State B on a transitory basis in order to provide effective legal services to the lawyer's clients who have affairs that are interstate in character. It is certainly often necessary for such a lawyer, while physically present in State A, to have tangential relationships with State B, such as by researching and advising clients about the law of State B.<sup>205</sup> It would impose an undue and unwarranted burden on such useful and benign legal services for a distant state to assert the power to bring into its bar disciplinary system a lawyer admitted in and primarily practicing in another state, whose activities have not had a significant and direct contact with the state considering disciplinary action.

For those reasons, it would be entirely unnecessary and unwise to empower a state's bar counsel to bring before the local disciplinary hearing body each instance in which it would be constitutional to do so, although that is typically the only limitation on the exercise of judicial jurisdiction in private-party civil litigation. Jurisdiction should be limited to situations of strong and important state regulatory interest. That can be accomplished by limiting the grant of jurisdiction by signaling to bar counsel, the disciplinary hearing body, and the reviewing supreme court the concept that the grant of jurisdiction is to be used only when there is a significant local impact caused by the lawyer's alleged acts and when that impact involves important local interests. Those generalities can perhaps best be captured through illustrative cases.

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204. See *supra* text accompanying note 179.

205. Some lawyers with whom I've discussed the issue balk at this as a generality, although their hesitation often seems based on the notion that the advice is flat-footedly unconditional. But no one to whom I have spoken has balked at the idea that lawyers everywhere should be considered competent to research and advise their clients about Delaware corporate law. Surely, however, the concept is more robust than that.

Consider, first, the instance of in-state solicitation of clients, as in the *Allen* decision.<sup>206</sup> Given the strong state interest in protecting in-state residents against the importuning and invasion of privacy that solicitation is thought often to entail,<sup>207</sup> as well as the charge of deliberate and extensive in-state activity, West Virginia could quite plausibly find that the charged acts of the lawyers had a significant local impact and that the impact involved important local interests. More difficult by far would be a charge against an out-of-state lawyer that the lawyer's website contained impermissible advertising, when assessed under the professional rules of the charging state although it was unexceptional under the rules of the state in which the lawyer maintained an office and was admitted. Unless the charging state bar counsel could demonstrate some significant local connection between the website and the state, jurisdiction should not be permitted, even if doing so would (perhaps barely) pass muster under the Fourteenth Amendment.<sup>208</sup> Also clearly within the defined regulatory jurisdiction would be a claim that a lawyer admitted *pro hac vice* had committed a disciplinary offense that affected the proceeding or a local participant in it. Even if the offense occurred during the course of a pretrial deposition being taken in another jurisdiction, the facts might indicate the kind of local impact and the involvement of local regulatory interests warranting assertion of jurisdiction.

State power should certainly encompass all such important cases. Accordingly, jurisdictions should be cautious in adopting the language of many of the pioneering regulations that now attempt to transcend the local admission rule. Some of them speak of an out-of-state lawyer "practicing law" within the jurisdiction,<sup>209</sup> or a similar practice-related term. To be sure, that will cover most of the instances in which it would be sound policy for the state to exercise disciplinary jurisdiction. On the other hand, it may be under-inclusive if interpreted, as the words would suggest, to exclude such practices as impermissibly soliciting clients within the state. It takes more than a substantial stretch of language to pull "practicing law" that far, particularly given the mandated ideals of practice as spelled out in the jurisdiction's own rules. While most states

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206. See *supra* notes 16-21 and accompanying text.

207. See *supra* note 24.

208. Cf. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997) (employing for purposes of due process test of exercise of judicial jurisdiction, a sliding scale, ranging from active involvement with in-state customers by business over the Internet to merely passive posting of information on website, accessible throughout reach of Internet).

209. See *supra* notes 38, 160.

would probably make the stretch to reach the violation,<sup>210</sup> a more straightforward solution would be to include an additional phrase such as “or take other practice-related actions within the state.”

### VIII. CONCLUSION

The system of lawyer discipline in most states has now been professionalized and otherwise placed on a surer regulatory footing. Calls for further reform are heard, of course, and many have merit. One clear reform would be that suggested here—extending the reach of the state’s lawyer-regulatory arm only a modest distance to reach certain serious instances of in-state activity by nonadmitted lawyers. The admission-only rule is an anachronism whose reason for existence has long since passed from the disciplinary scene. It, too, should be consigned to the dustbin of legal ethics history.

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210. *See supra* note 159.